(1)

01-808

No. 01- ___

Supreme Court, U.S.
FILED
OCT 30 2001
OFFICE OF THE CLERK

In The

Supreme Court of the United States

RONALD P. HAMM,
Secretary of Natural Resources,
Commonwealth of Virginia, and Dennis H. Treacy, Jr.
Director, Department of Environmental Quality,
Commonwealth of Virginia,

Petitioners,

v.

WASTE MANAGEMENT HOLDINGS,
INCORPORATED, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

RANDOLPH A. BEALES
Attorney General of Virginia

WILLIAM H. HURD
Solicitor General
Counsel of Record

RICHARD CAMPBELL
Deputy Attorney General

JOHN BUTCHER
ROGER L. CHAFFE
Senior Assistant Attorneys General

WILLIAM E. THRO
Special Assistant Attorney General

900 East Main Street
Richmond, Virginia 23219
(804) 786-2436 (voice)
(804) 371-0200 (facsimile)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

ORIGINAL

$20pp

11/30/01 FRI 17:06 FAX 402 341 6712 COCKLE PRINTING 005

QUESTIONS PRESENTED

1. Under the dormant Commerce Clause, what is the appropriate level of scrutiny for a statute arising from mixed motives, partly legitimate and partly discriminatory?

2. When a State enacts laws to protect itself from the health and safety hazards posed by municipal solid waste, may the State impose identical restrictions on *all* such waste – regardless of its source – or is the State obligated to give preferential treatment to waste from States whose laws are facially similar to the laws of the regulating State?

3. (a) Under the dormant Commerce Clause, may a State interfere with the national common market by forcing – or "dumping" – undesirable goods into interstate commerce so as to protect the originating State from their undesirable effects?

   (b) If not, to what extent are the goods thus "dumped" nevertheless protected by the dormant Commerce Clause?

11/30/01 FRI 17:06 FAX 402 341 8712 COCKLE PRINTING 006

PARTIES TO THE PROCEEDINGS

The petitioners are Ronald P. Hamm, in his official capacity as Secretary of Natural Resources of Virginia, and Dennis H. Treacy, Jr., in his official capacity as the Director of the Virginia Department of Environmental Quality. Director Treacy is the state officer charged with the enforcement of Virginia's environmental statutes at issue here, and is responsible to Secretary Hamm for his actions. Secretary Hamm replaces John Paul Woodley, Jr., who served as Secretary of Natural Resources during the proceedings below, and who recently left that post. *See* Sup. Ct. R. 35.3.

There are five respondents, including four private firms with contracts to dispose of municipal solid waste from metropolitan New York: Waste Management Holdings, Inc., Hale Intermodal Marine Company, Weanack Land Limited Partners, and Brunswick Waste Management Facility. These respondents wish to dispose of the municipal solid waste by placing it in landfills in Virginia.

The fifth respondent is Charles City County, a political subdivision of the Commonwealth of Virginia. Charles City County operates a landfill that accepts municipal solid waste from outside of Virginia, including waste from the private firms under contract to dispose of waste from New York.

In addition, James S. Gilmore, III, in his official capacity as Governor of Virginia, was a party to the proceedings in both the district court and the court of appeals; however, the court of appeals correctly held that Governor Gilmore is not a proper party to this action.

11/30/01 FRI 17:07 FAX 402 341 8712 COCKLE PRINTING 007

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
INTRODUCTION	1
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE	2
STATEMENT OF THE CASE	3
1. The Level of Scrutiny Issue	4
2. The Public Health Issue	5
3 The New York Dumping Issue	7
REASONS FOR GRANTING THE PETITION	11
Summary	11
I. The Court Should Clarify Which Level of Scrutiny Applies When a Statute Has Mixed Purposes	12
II. The Court Should Decide Whether a State, in the Exercise of Its Sovereign Powers Over Health and Safety, Is Required to Give Preferential Treatment to Goods from Particular States	20
III. The Court Should Clarify Whether a State May Interfere with the National Common Market by Requiring the Export of Undesirable Products	24
CONCLUSION	30

11/30/01 FRI 17:07 FAX 402 341 8712 COCKLE PRINTING 008

TABLE OF CONTENTS – Continued

Page

APPENDIX

Waste Management Holdings, Inc. v. Gilmore, 252 F.3d 316 (4th Cir. 2001) ..... App. 1

Waste Management Holdings, Inc. v. Gilmore, 64 F. Supp.2d 523 (E.D.Va. 1999) ..... App. 67

Waste Management Holdings, Inc. v. Gilmore, 64 F. Supp.2d 537 (E.D.Va. 1999) ..... App. 98

Waste Management Holdings, Inc. v. Gilmore, 87 F. Supp.2d 536 (E.D.Va. 2000) ..... App. 123

Waste Management Holdings, Inc. v. Gilmore, (unreported striking affirmative defenses as insufficient under Rule 12(f)) (E.D. Va. Aug. 24, 1999) ..... App. 147

Waste Management Holdings, Inc. v. Gilmore, (unreported, denying rehearing and rehearing *en banc*) (4th Cir. July 2, 2001) ..... App. 154

Va. Code § 10.1-1408.1 ..... App. 156

Va. Code § 10.1-1408.3 ..... App. 173

Va. Code § 10.1-1454.1 ..... App. 175

Va. Code § 10.1-1454.2 ..... App. 179

Va. Code § 10.1-1454.3 ..... App. 180

11/30/01 FRI 17:07 FAX 402 341 8742 COCKLE PRINTING 009

TABLE OF AUTHORITIES

Page

CASES

Aldridge v. Williams, 44 U.S. (3 How.) 9 (1845)..... 14

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935)....22, 25

Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986)..... 13

C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994).....13, 15

Chemical Waste Management v. Hunt, 504 U.S. 334 (1992)..... 20

Clason v. Indiana, 306 U.S. 439 (1939)..... 6

Environmental Technology Council v. Sierra Club, 98 F.3d 774 (4th Cir. 1996).....15, 16

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 504 U.S. 353 (1992).....20, 22

Foster-Fountain Packing Co. v. Haved, 278 U.S. 1 (1928)..... 26

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949)..... 1, 25, 26, 27

Healy v. Beer Institute Inc., 491 U.S. 324 (1989)..... 26

Hughes v. Oklahoma, 441 U.S. 322 (1979)..... 13

Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333 (1977)..... 15

Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796).... 27

Lemon v. Kurtzman, 403 U.S. 602 (1971)..... 14

11/30/01 FRI 17:07 FAX 402 341 8712 COCKLE PRINTING 010

TABLE OF AUTHORITIES – Continued

Page

Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980) 2

Lynch v. Donnelly, 465 U.S. 668 (1984) 14

Maine v. Taylor, 477 U.S. 131 (1986) ..... *passim*

Massachusetts v. Pike, 701 N.E.2d 951 (Mass. 1998) 28

McGowan v. Maryland, 366 U.S. 420 (1961) 19

Michigan v. Baum, 231 N.W. 95 (Mich. 1930) 28

Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998) 14

Oregon Waste Sys., Inc. v. Department of Environmental Quality, 511 U.S. 93 (1994) 15

Philadelphia v. New Jersey, 437 U.S. 617 (1978) 13, 15, 20, 25

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) ... 13, 18, 29

Printz v. United States, 521 U.S. 898 (1997) 1

Rutherford v. Blankenship, 468 F. Supp. 1357 (W.D. Va. 1979) 28

Shelley v. Kraemer, 334 U.S. 1 (1948) 29

U.S. Term Limits v. Thornton, 514 U.S. 779 (1995) 1

United States v. O'Brien, 472 U.S. 367 (1968) 18, 19

Wallace v. Jaffree, 472 U.S. 38 (1985) 14

Waste Management Holdings, Inc. v. Gilmore, 252 F.3d 316 (4th Cir. 2001) 1

Waste Management Holdings, Inc. v. Gilmore, 64 F. Supp.2d 573 (E.D. Va. 1999) 2

11/30/01 FRI 17:08 FAX 402 341 6712 COCKLE PRINTING 011

TABLE OF AUTHORITIES – Continued

Page

Waste Management Holdings, Inc. v. Gilmore, 64 F. Supp.2d 537 (E.D. Va. 1999) 2

Waste Management Holdings, Inc. v. Gilmore, 87 F. Supp.2d 536 (E.D. Va. 2000) 2

Westinghouse Elec. Corp. v. Tully, 466 U.S. 388 (1984) 1, 24

Wyoming v. Oklahoma, 502 U.S. 437 (1992) 16

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. I, § 8, cl. 3 ..... *passim*

STATUTES

28 U.S.C. § 1331 4

28 U.S.C. § 1254(1) 2

Virginia Code § 10.1-1408.1 ..... *passim*

Virginia Code § 10.1-1408.3 ..... *passim*

Virginia Code § 10.1-1454.1 ..... 3, 5

Virginia Code § 10.1-1454.2 ..... 3, 5

Virginia Code § 10.1-1454.3 ..... *passim*

TREATIES

Final Act Embodying the Result of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994) 29

North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289 (1992) 29

Treaty on European Union, Feb. 7, 1992, 31 I.L.M. 247 (1992) 29

11/30/01 FRI 17:08 FAX 402 341 8712 COCKLE PRINTING 012

TABLE OF AUTHORITIES – Continued

Page

RULES

Sup. Ct. R. 14(g)(ii) 4

Sup. Ct. R. 35.3 ii

BOOKS

ADAM SMITH, THE WEALTH OF NATIONS 471 (1776, Penguin Classic ed. 1986) 27, 28

JOHN S. PANCAKE, THOMAS JEFFERSON AND ALEXANDER HAMILTON, 172 (1974) 27

LEONARD LEVY, ORIGINAL INTENT AND THE FRAMERS CONSTITUTION 68-69 (1988) 27

NEWSPAPERS

Bruce Lambert, *Mayor Tells Non-New Yorkers That City's Trash Is Price for What They Reap*, N.Y. TIMES, Jan. 14, 1999 at B-3 9

Douglas Martin and Andrew C. Revkin, *New York City Forced to Rethink Plans to Send Trash Out of State*, N.Y. TIMES, Feb. 21, 1999 at B-1 ..... 8, 9

Vivian S. Toy, *Giuliani Attacks Recycling Goals As A Suit Is Filed*, N.Y. TIMES, July 3, 1996 at A-1 ..... 8, 9

Ringing in Recycling, Editorial, N.Y. TIMES, Dec. 30, 1996 at A-14 10

11/30/01 FRI 17:08 FAX 402 341 8712 COCKLE PRINTING 013

PETITION FOR WRIT OF CERTIORARI

Ronald P. Hamm, Secretary of Natural Resources of Virginia, and Dennis H. Treacy, Jr., Director of the Virginia Department of Environmental Quality (collectively, "the Commonwealth"), by their counsel, the Attorney General of Virginia, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

INTRODUCTION

In 1786, the Commonwealth of Virginia initiated the process that led to the adoption of our Constitution. The purpose of Virginia's effort was encouraging free trade among the States. *See H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949). The Constitution fulfilled Virginia's aspiration by establishing a national common market. *See Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 402-03 (1984). It also "split the atom of sovereignty," *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J. concurring), vesting much sovereignty with the new national government while leaving the States a "residuary and inviolable sovereignty." *Printz v. United States*, 521 U.S. 898, 918-19 (1997). Today, the Commonwealth asks this Court to clarify the parameters of both the national common market and the residuary and inviolable sovereignty of the States as it relates to public health and safety. Specifically, Virginia asks this Court to define its constitutional obligation to accept municipal solid waste ("MSW") from other States, much of which is hazardous to the health and safety of Virginia.

OPINIONS BELOW

The opinion of the court of appeals is reported as *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316 (4th Cir. 2001). It is reprinted in the appendix to this

11/30/01 FRI 17:08 FAX 102 341 8712 COCKLE PRINTING

petition at App. 1. The Fourth Circuit denied a request for rehearing en banc, and that denial, which is unreported, is reprinted at App. 154. Three opinions of the district court are reported as *Waste Management Holdings, Inc. v. Gilmore*, 64 F. Supp.2d 523 (E.D. Va. 1999), 64 F. Supp.2d 537 (E.D. Va. 1999), and 87 F. Supp.2d 536 (E.D. Va. 2000). A fourth opinion, which strikes the affirmative defenses at issue in this petition, is unreported. These opinions are reprinted at App. 67, 98, 123 and 147 respectively.

JURISDICTION

The court of appeals entered its judgment on June 4, 2001. Secretary Hamm's predecessor and Director Treacy filed a timely petition for rehearing en banc, which was denied on July 2, 2001. Although the deadline for filing a petition for writ of certiorari was October 1, 2001, the Chief Justice, by order dated September 25, 2001, extended that deadline until October 30, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

1. The Commerce Clause of the Constitution empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. I, § 8, cl. 3. At issue in this case is the "dormant" aspect of the Commerce Clause, which limits state interference with the free flow of commerce, even in the absence of Congressional action. *See, e.g., Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35 (1980).

2. This case involves five Virginia statutes ("MSW statutes") that collectively cap the amount of MSW that may be accepted by landfills located in Virginia, and that

restrict the use of barges and trucks to transport such waste in Virginia:

a. Virginia Code § 10.1-1408.1 ("Trucking Certification") prohibits landfills from accepting MSW from a vehicle with four or more axles "unless the transporter of the waste provides certification, in a form prescribed by the Board, that the waste is free of substances not authorized for acceptance at the facility." *See* App. 156.

b. Virginia Code § 10.1-1408.3 ("Daily Cap") caps the amount of waste that any landfill located in Virginia may accept in one day. *See* App. 173.

c. Virginia Code § 10.1-1454.1 ("Stacking Provision") requires the Virginia Waste Management Board to promulgate regulations governing the transport of MSW by ship, barge, or other vessel, as well as the loading and unloading of such waste. *See* App. 175.

d. Virginia Code § 10.1-1454.2 ("Three Rivers Ban") prohibits "the commercial transport of hazardous or nonhazardous solid waste . . . by ship, barge or other vessel upon the navigable waters of the Rappahanock, James and York Rivers, to the fullest extent consistent with limitations posed by the Constitution of the United States." *See* App. 179

e. Virginia Code § 10.1-1454.3 ("Four Axle") requires the Virginia Waste Management Board to develop regulations governing the "commercial transport" of MSW by "any tractor truck semitrailer combination with four or more axles." *See* App. 180.

STATEMENT OF THE CASE

This case arises out of efforts by Virginia to protect its citizens from health and safety hazards posed by municipal solid waste, much of it originating outside its borders. At issue are three aspects of the dormant Commerce Clause, involving (1) the level of scrutiny applied

11/30/01 FRI 17:09 FAX 402 341 8712 COCKLE PRINTING 016

to mixed motive statutes, (2) the determination of least discriminatory means, and (3) the practice "dumping" undesirable products into interstate commerce.

In 1999, Virginia enacted series of public health and safety statutes designed to improve MSW management in the Commonwealth. Shortly thereafter, the respondents filed suit.[1] They sought a declaratory judgment that all five MSW statutes are unconstitutional as well as an injunction against their further enforcement. The respondents contended that the various statutes violated the dormant Commerce Clause and/or Supremacy Clause.

The district court granted all relief requested by the respondents. On appeal, the Fourth Circuit found that all five MSW statutes are facially neutral. For three of the statutes – Daily Cap, Trucking Certification and Four Axle – it said the evidence on summary judgment was inconclusive whether there was discrimination in practical effect. The court of appeals also found reason to believe that MSW from other States is more dangerous than the more tightly-regulated MSW from Virginia, and that Virginia has a legitimate health and safety interest in regulating out-of-state waste. Based on these conclusions, the court of appeals vacated and remanded in part; however, it also affirmed in part. In so affirming, it made three fundamental errors. These errors implicate important constitutional questions on which this Court should rule.

1. The Level of Scrutiny Issue

First, the court of appeals correctly held that all five MSW statutes are facially neutral, *see* App. 26, and that

---

[1] Pursuant to Sup. Ct. R. 14(g)(ii), petitioners state that the basis for jurisdiction in the district court was the general federal question statute, 28 U.S.C. § 1331.

11/30/01 FRI 17:09 FAX 402 341 9712 COCKLE PRINTING 017

the evidence is inconclusive as to whether the Daily Cap, Trucking Certification, and Four Axle statutes have the practical effect of discriminating against interstate commerce, *see* App. 27-28, 30.[2] The court of appeals found that the statutes arise from mixed motives. It said they were intended to discriminate against out-of-state MSW, but also recognized that they were intended to advance legitimate health and safety interests. Notwithstanding the presence of legitimate motives, the court of appeals subjected these statutes to the most stringent level of review available in dormant Commerce Clause cases.

2. The Public Health Issue

Second, having incorrectly concluded that strict scrutiny applies, the court of appeals compounded its error in the way it applied the strict scrutiny standard to the Daily Cap.[3] Even under strict scrutiny, the Daily Cap statute must still be upheld if Virginia could "demonstrate both [1] that the statute serves a legitimate local purpose, and [2] that this purpose could not be served as

---

[2] The court of appeals also determined that two of the MSW statutes, the Stacking Provision and Three Rivers Ban, do discriminate against interstate commerce in their practical effect. *See* App. at 29-30. However, the court of appeals ultimately concluded that a trial was necessary on the issue of whether these two statutes are thus unconstitutional. *See* App. 48-49. Therefore, the constitutionality of these statutes is not at issue in this petition. However, whether the respondents have standing to challenge the constitutionality of the Stacking Provision and Three Rivers Ban is at issue here. The petitioners contend their affirmative defenses preclude standing.

[3] Assuming that strict scrutiny applies, the court of appeals did not err in the way it applied the strict scrutiny standard to the Trucking Certification and Four Axle provisions. However, the petitioners contend that strict scrutiny should not apply to the Trucking Certification and Four Axle provisions.

11/30/01 FRI 17:09 FAX 402 341 8712 COCKLE PRINTING 010

well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986). The court of appeals correctly ruled that the first part of this test was met. It found reason to believe that MSW from other States is more dangerous to the public health than MSW from Virginia, and said that Virginia's interest in protecting its citizens from the harms of MSW is a legitimate local interest that justifies burdening interstate commerce. *See* App. 42-44. However, on the second part of the test, the court of appeals ruled against Virginia. It rejected the Commonwealth's contention that limiting the amount of MSW from *all* sources is a permissible means of achieving this objective.

Rather, the court of appeals said it is unconstitutional for Virginia to treat *all* MSW, regardless of its State of origin, in the same manner. If Virginia wishes to protect the public health, the court of appeals said Virginia must grant preferential treatment to MSW from those few States that have laws similar to Virginia's, while discriminating against MSW from States with less stringent laws.

Moreover, the court of appeals reached this result although there is no evidence that MSW coming from other States is accompanied by State-issued certificates of compliance with the laws of those States. Instead, the basis for requiring such disparate treatment is the tacit – and unreasonable – assumption that those engaged in MSW disposal from other States always abide by the laws of those States. Virginia believes that it *may* indulge in such a presumption and give preferential treatment to goods from particular States; however, the Constitution does not *require* Virginia to do so. In the exercise of its power to protect health and safety, Virginia may choose to make MSW coming from all other States subject to the same requirement, especially since Virginia-generated waste is also subject to that requirement. *See Clason v.*

11/30/01 FRI 17:10 FAX 402 341 8712 COCKLE PRINTING 019

Indiana, 306 U.S. 439, 443 (1939) ("The power of the state to prescribe regulations which shall prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well established").

3. The New York Dumping Issue

In the district court, the Commonwealth raised affirmative defenses based on the conduct of New York. The statutes enacted by the General Assembly do not treat waste from New York differently than waste from Virginia or from any other State. Even so, waste originating in New York was very much the focal point of the lawsuit.[4] The Commonwealth believes that this waste is being sent into Virginia – rather than being sent to landfills in upstate New York – only because New York has interfered with the free market and is unconstitutionally "dumping" its wastes into interstate commerce. Thus, the Commonwealth raised the following affirmative defenses in its answers to the complaints:

> To the extent that Virginia's regulation of municipal solid waste were to be considered unconstitutional, the acts of New York City and/or New York State to discourage or prevent disposal of municipal solid waste in the City and in the State also violate the Constitution and public policy and distort interstate commerce. Accordingly, *as to New York City waste*:
>
> A. Virginia's statutes do not violate the Constitution but merely respond to the flood of garbage produced by New York City's and

---

[4] For example, the complaint of Waste Management contains 43 references to New York State, New York City or various boroughs of the City. J.A. 27. The district court also focused heavily on New York. *See* App. 72-73.

11/30/01 FRI 17:10 FAX 202 341 8712 COCKLE PRINTING 020

New York State's own acts in violation of the Constitution and public policy and in distorting interstate commerce;

B. New York City, through the Plaintiffs here, comes to court with unclean hands and should be denied any relief; and

C. Virginia's statutes do not cause the Plaintiffs any cognizable injury and they are entitled to no relief.

Said otherwise, New York cannot refuse to dispose of its own garbage in New York and then complain that the Commonwealth attempts to regulate the disposal in Virginia.

J.A. 160-61 and 179-80.[5] Those affirmative defenses were based on a number of widely reported facts, which were called to the attention of the district court.

First, for years, the garbage generated by New York City was buried at Fresh Kills landfill on Staten Island. In 1996, at the urging of officials in New York City and New York State, legislation was adopted that mandated the closing of Fresh Kills by December 31, 2001. Shutting down that massive landfill means that New York City must find new places to ship the more than 4 million tons of garbage it generates each year. *See* Vivian S. Toy, *Giuliani Attacks Recycling Goals As A Suit Is Filed*, N.Y. TIMES, July 3, 1996 at A-1.

Second, there is unused landfill capacity in New York State, and the existing landfills there could annually accommodate 5.2 million tons of garbage from the City. *See* Douglas Martin and Andrew C. Revkin, *New York City Forced to Rethink Plans to Send Trash Out of State*, N.Y.

---

[5] This dispute obviously arose before the events of September 11, 2001, and does not implicate cooperative interstate efforts to dispose of debris from the World Trade Center. Additionally, such debris falls outside of the definition of MSW.

11/30/01 FRI 17:10 FAX 202 341 8712 COCKLE PRINTING 021

Times, Feb. 21, 1999 at B-1. Those landfills are much closer to the City than the landfills in Virginia; but, so far, no garbage from the City has been taken there. *See id.* This is because using those landfills would have economic, environmental and public relations consequences within New York State that officials there wish to avoid. For example, allowing the City's garbage to flow into nearby upstate landfills would so increase the demand for those facilities that the prices they charge to other New York communities would inevitably increase. *See id.* Moreover, the accelerated use of landfill capacity would lead to earlier exhaustion of existing landfills and a need for new landfills. Environmental resources otherwise husbanded for future generations of New Yorkers would be expended much sooner. Similarly, while the closing of Fresh Kills may be popular among people living near the site, the economic and environmental costs of burying garbage from the City in upstate New York would risk widespread public resentment of those officials responsible for the closing of Fresh Kills.

Third, in order to avoid these consequences, New York adopted a policy and practice of targeting other States. *See* Vivian S. Toy, *supra*, at A-1. ("Mr. Giuliani again insisted that the City should turn to out-of-state landfills as an alternative for the 13,000 tons of garbage that goes to Fresh Kills every day."). Even without discovery, the Commonwealth was able to identify two methods by which New York carries out its protectionist program. To begin, New York City has given upstate communities a veto over whether garbage from the City will be buried in their areas. Douglas Martin and Andrew C. Revkin, *supra*, at B-1. By contrast, Virginia and other States have been allowed no such veto. Instead, New York said that Virginia must accept its waste as a kind of compensation for the cultural and financial amenities provided by the City. Bruce Lambert, *Mayor Tells Non-*

11/30/01 FRI 17:10 FAX 402 341 8712 COCKLE PRINTING 022

New Yorkers That City's Trash Is Price for What They Reap, N.Y. TIMES, Jan. 14, 1999 at B-3. Additionally, New York discriminates against transportation by truck. Respondents conceded that the City has "specifically indicated a desire that the waste stream be moved by barge and/or rail rather than by truck." J.A. 37 Indeed, the respondents said that "the City's long-term waste export program will rely to the maximum-extent possible on marine and rail-based capacity." J.A. 37

Fourth, trucks are the most flexible method for carrying garbage out of the City in that they allow for transportation to upstate New York as well as to other States. Yet, trucks are to be prohibited. The ability of rail to handle the traffic is questionable. *See Ringing in Recycling*, Editorial, N.Y. TIMES, Dec. 30, 1996 at A-14. (noting lack of freight line across the Hudson River.). Only barges are left. As a practical matter, use of barges precludes disposal in upstate New York, and thus ensures that the garbage will be taken to other States near the Atlantic seaboard, such as Virginia. New York City's pending ban on garbage-laden trucks leaves available *no* effective means for the City's waste to reach upstate landfills and thus *artificially* forces the garbage to cross State lines.

In response to the Commonwealth's affirmative defenses, the district court held that, as a matter of law, the forced exportation of undesirable products does not constitute a violation of the dormant Commerce Clause and struck the affirmative defenses. *See* App. 147. The court of appeals failed even to consider the possibility that New York may have engaged in unconstitutional conduct, and that, as a result, the respondents lack standing to bring this suit. The court of appeals did not address the validity of this legal theory, but instead "[saw] no basis for somehow holding any of the Plaintiffs vicariously liable for the conduct of the State of New York and/or New York City." App. 56. The court of appeals

11/30/01 FRI 17:11 FAX 402 341 8712 COCKLE PRINTING 023

failed to recognize the connection between the unconstitutional conduct of New York and the contracts by which respondents served as instrumentalities of that conduct. This connection is important for three reasons: (1) Being tainted by "unclean hands," respondents are not entitled to any equitable relief; (2) To the extent the respondents' contracts resulted from unconstitutional conduct, those contracts are void as a matter of public policy and cannot be enforced by any court; and (3) Any "harm" suffered by respondents in their ability to discharge their contracts is not a "cognizable injury." In short, if the respondents are the beneficiaries of unconstitutional conduct, then they have no standing to bring this action.

REASONS FOR GRANTING THE PETITION

Summary

Certiorari is warranted to consider questions of exceptional importance concerning the requirements of the dormant Commerce Clause.

First, this Court should clarify the appropriate level of scrutiny for a statute that does not discriminate against interstate commerce either on its face or in its practical effect, the two factors historically considered by this Court. Since the Daily Cap, Trucking Certification, and Four Axle statutes do not discriminate against interstate commerce on their face or in their practical effect, deferential scrutiny is appropriate. Yet, the court of appeals chose to examine the *purpose* behind the statutes and, based upon the legislature's *mixed* motives, applied strict scrutiny.

Second, regardless of the appropriate level of scrutiny, this Court should determine the degree of discretion that a State has when it restricts interstate commerce for health and safety reasons. While the court of appeals

11/30/01 FRI 17:11 FAX 402 341 8712 COCKLE PRINTING 024

expressly acknowledged that concerns about the dangers of MSW would allow Virginia to restrict importation, it also declared that Virginia *must not* treat all MSW from all other States in the *same* manner. Rather, the court of appeals held that, if Virginia wishes to protect against the dangers of MSW, it must give preferential treatment to MSW from those States that have statutes as stringent as Virginia's. The court of appeals' interpretation (1) violates this Court's decision that a State can ban articles in interstate commerce on public health grounds, (2) unreasonably requires Virginia to presume that private parties have complied with the laws of other States, and (3) as a practical matter, makes it impossible for Virginia to exercise its sovereign interest in insuring public health and safety.

Third, this Court should determine whether the dormant Commerce Clause forbids a State from taking artificial measures to force the exportation of undesirable products to other States. Virginia has alleged that, absent artificial restrictions or incentives, the MSW from New York City would never leave New York. However, because New York and/or New York City have deliberately interfered with the free flow of commerce, the MSW from New York City has been exported to Virginia. This is unconstitutional. The Constitution establishes a national common market and, absent extraordinary circumstances, the States cannot interfere.

I. THE COURT SHOULD CLARIFY WHICH LEVEL OF SCRUTINY APPLIES WHEN A STATUTE HAS MIXED PURPOSES.

This case offers the Court an opportunity to decide which level of scrutiny applies when a statute challenged under the dormant Commerce Clause is enacted out of

11/30/01 FRI 17:11 FAX 402 341 8712 COCKLE PRINTING 025

mixed motives, *i.e.*, partly legitimate and partly discriminatory. Should such a statute receive the *deferential scrutiny* that ordinarily guides federal court review of state statutes? Or, should the statute be subjected to *strict scrutiny*? This is an issue that implicates two basic – and sometimes competing – constitutional values: our national common market and the residual sovereignty of the States. The reconciliation of these values is an issue on which direction is needed from our nation's highest tribunal.

By way of background, the Court has established a two-tiered framework for evaluating challenges under the dormant Commerce Clause. *See Maine v. Taylor*, 477 U.S. 131, 138 (1986). First, some statutes are subjected to a more stringent review, here called "strict scrutiny." In order to prevail on this level of review, the State must "demonstrate both that the statute 'serves a legitimate local purpose' and that the purpose could not be served as well by available nondiscriminatory means." *Taylor*, 477 U.S. at 138 (*quoting Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)) Given the difficulty of this task, the Court has noted that statutes subject to strict scrutiny "are virtually *per se* invalid." *See Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Second, other statutes are subjected to less stringent review, herein called "deferential scrutiny." Under this level of review, the statute will be upheld unless "the burden imposed on interstate commerce clearly exceeds the local benefits." *Brown-Foreman Distillers Corp v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Because of the significant differences between these two standards, determining the appropriate level of scrutiny is a critical step in any dormant Commerce Clause challenge. Yet, "there is no clear line separating these categories." *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 403 (1994) (O'Connor, J.,

11/30/01 FRI 17:12 FAX 402 341 8712 COCKLE PRINTING 026

concurring). This petition presents the question of how legislative motives affect the choice between these two tiers.

As a general rule, legislative motives play no part in determining the constitutionality of a statute. "[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 79 (1998). As this Court explained:

> In expounding this law, the judgment of the court cannot, in any degree, be influenced by . . . the motives or reasons assigned by [legislators] for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is the act itself, and we must gather their intention from the language there used. . . .

Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845).

Yet, the rule is not absolute. One exception is found in Establishment Clause cases. Under the first prong of the *Lemon* test, courts will examine a challenged statute to ascertain whether it has "a secular legislative purpose." *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971). Mixed motive statutes do not run afoul of this prong. "The Court has invalidated legislation . . . on the ground that a secular purpose was lacking, but *only* when it has concluded there was *no question* that the statute or activity was motivated *wholly* by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 608 (1984) (emphasis added). "Were the test that the government must have 'exclusively secular' objectives, much of the conduct and legislation this Court has approved in the past would have been invalidated." *Id.* at 681, n 6. *Accord, Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

In the context of the dormant Commerce Clause, this Court's jurisprudence in dealing with legislative purpose is far less developed – and much less cohesive. The Court

11/30/01 FRI 17:12 FAX 402 341 8712 COCKLE PRINTING 027

has said that, under the dormant Commerce Clause, strict scrutiny applies when the statute is discriminatory on its face. *Oregon Waste Sys., Inc. v. Department of Environmental Quality*, 511 U.S. 93, 100 n.4 (1994). By contrast, if the statute is even-handed in its regulation of interstate and intrastate commerce, then deferential scrutiny has been said to apply. *See Carbone*, 511 U.S. at 404-05 (O'Connor, J., concurring) (facially neutral statute not subject to strict scrutiny, but statute invalid under deferential scrutiny because burden on interstate commerce outweighs local benefits); *id.* at 411 (Souter, J., joined by Rehnquist, C.J., and Blackmun, J., dissenting) (suggesting that facially neutral laws should always receive deferential scrutiny). *See also Philadelphia*, 417 U.S. at 626-27 (striking down New Jersey law imposing ban on out-of-state waste, but suggesting that State "may pursue [financial and landfill conservation] ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected."). The Court has also said that strict scrutiny applies where the statute discriminates against interstate commerce "*either* on its face, or in practical effect." *Taylor*, 477 U.S. at 138; *Hughes*, 441 U.S. 336. By omitting any reference to legislative purpose, these two cases suggest that purpose plays no part *at all* in determining which level of scrutiny to apply. On the other hand, in *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 351-54 (1977), the Court discussed the discriminatory comments of public officials charged with administering a statute, but only after the Court had already decided that the statute, while neutral on its face, was discriminatory in its practical effect.

Thus, it is unclear whether legislative purpose is an independent factor in determining whether to subject a statute to strict scrutiny.[6] Moreover, if legislative purpose

---

[6] In looking at legislative purpose, the court of appeals relied upon its decision in *Environmental Technology Council v.*

11/30/01 FRI 17:12 FAX 402 341 8712 COCKLE PRINTING 028

is an independent factor, it is unclear what to do about a statute with *mixed* purposes. Should *any* discriminatory purpose lead to strict scrutiny? Or, following the example set for the Establishment Clause, should a discriminatory purpose have unfavorable consequences *only* when the statute has *no* legitimate purpose?

There are at least four reasons why this petition is a good vehicle for answering these questions. First, the case presents substantial evidence of mixed motives. In the proceedings below, respondents focused on evidence showing an intention to discriminate against MSW coming from out-of state, and thus argued for strict scrutiny.[7] The Commonwealth focused on evidence showing a legitimate motive – protecting Virginia from the hazards of MSW – and thus argued for a deferential standard. The court of appeals acknowledged *both* motives. For example, it said: "[N]o reasonable juror could find that in enacting the statutory provisions at issue Virginia's General Assembly acted without a discriminatory purpose." App. 31. But, it also said:

> [A] reasonable juror could infer that, as a whole, MSW generated outside Virginia poses health

---

Sierra Club, 98 F.3d 774 (4th Cir. 1996), which states that strict scrutiny 'applies where a state law discriminates facially, in its practical effect, *or in its purpose*." *Id.* at 785 (emphasis added). The *Sierra Club* decision then cites this Court's decision in *Wyoming v. Oklahoma*, 502 U.S. 437, 454-55 (1992) in support. However, there is nothing in *Wyoming* that supports a separate inquiry into purpose. Indeed, in *Wyoming*, this Court declared that the "Special Master correctly found that the Act, *on its face and in practical effect*, discriminates against interstate commerce." *Id.* at 455 (emphasis added).

[7] In proceedings below, the Commonwealth disputed the allegation of discriminatory motives; however, that dispute is not at issue in this petition. Instead, the petition is based on the existence of mixed motives, partly discriminatory and partly legitimate, as reflected in the decision by the court of appeals.

11/30/01 FRI 17:12 FAX 402 341 8712 COCKLE PRINTING 029

> and safety risks not posed by MSW generated inside Virginia. Such a finding would satisfy the Defendants' burden of establishing that the statutory provisions at issue are justified by *a reason other than economic protectionism.*

App. 44 (emphasis added) (citing evidence on which conclusion based).

Second, the case is not cluttered by the two factors that commonly lead to strict scrutiny. The court of appeals found that *none* of the MSW statutes are discriminatory on their face, App. 26, and that, for three statutes – Daily Cap, Trucking Certification and Four Axle – there has been no showing of a discriminatory effect. App. 27, 28, 30. For these three statutes, the case squarely presents the question of how to approach statutes with mixed motives.

Third, the ruling by the court of appeals is clear. By subjecting these three statutes – Daily Cap, Trucking Certification and Four Axle – to strict scrutiny in the face of strongly mixed motives, the court of appeals implicitly – but necessarily – ruled that *any* discriminatory purpose is sufficient to invoke strict scrutiny. The issue is ripe for consideration by this Court.

Fourth the Commonwealth is prepared to demonstrate why mixed motive statutes should not receive strict scrutiny, but should receive the same deferential review that is normally afforded challenged State statutes. Those reasons may be summarized as follows:

a. As previously noted, the general rule is that legislative motives are not relevant in determining the constitutionality of a statute. *See supra* at 14. In the context of the dormant Commerce Clause, there is no reason that justifies an exception. In the practical, business world of interstate commerce, what matters is not what speeches legislators may have given, but what the *actual effect* of

11/30/01 FRI 17:13 FAX 402 341 8712 COCKLE PRINTING 030

the law will be. If a statute discriminates against interstate commerce *on its face*, then it will surely discriminate in practice, and strict scrutiny is warranted. If the statute is facially neutral, it still may discriminate in its *practical effect*. If it does, strict scrutiny is again warranted. But, when there is *no* discriminatory effect in the real world, any discriminatory legislative motive is but a tempest in a teapot. There is no cause for constitutional alarm. Strict scrutiny is an over-reaction.

b. To say that deferential review is appropriate is not to say that the challenged statute will necessarily survive. The law will still be struck "if the burdens [it] impose[s] on interstate trade are 'clearly excessive in relation to the putative local benefits.' " *Taylor*, 477 U.S. at 138 (quoting *Pike*, 397 U.S. at 142). If legislative motives are *wholly* discriminatory, it is unlikely that the State will be able to identify any local benefits and even less likely that those benefits will outweigh the burdens on interstate trade. On the other hand, if there are *legitimate* motives at work alongside discriminatory ones, then the State should have the opportunity to show that the local benefits predominate. Strict scrutiny unnecessarily – and unfairly – denies a State that opportunity.

c. Applying strict scrutiny where there are mixed motives and no discriminatory effect is also inappropriate because of the difficulty in sorting out proper motives from improper ones. "Inquiries into congressional motives or purposes are a hazardous matter. . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." *United States v. O'Brien*, 472 U.S. 367, 373-74 (1968). Thus, statements by a few legislators – even if one is the primary sponsor – should not be dispositive. There are 140 members of the Virginia General Assembly – 100 members of the House of Delegates and 40 Senators.

11/30/01 FRI 17:13 FAX 402 341 8712 COCKLE PRINTING 031

There is no way to know what motivated each of them to vote for or against this legislation. Indeed, a court has no license to psychoanalyze the legislators. *See McGowan v. Maryland*, 366 U.S. 420, 466 (1961) (Frankfurter, J., concurring). The fact that a few legislators may have given voice to an unconstitutional motive does not mean that they did not have constitutional motives as well. Even less does it mean that 130-plus other legislators were motivated exclusively – or even primarily – by unconstitutional purposes. Contrary to the reasoning of the court of appeals, the musings of a few do not justify the imposition of the rule of almost *per se* invalidity. Federal courts should not void legislation which a State "had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." *O'Brien*, 472 U.S. at 374.

d. The values embodied in Establishment Clause are at least as important – indeed, more important – than those embodied in the dormant Commerce Clause. Thus, it makes no sense to treat mixed motive statutes more harshly when they deal with the transportation of garbage than when they deal with matters possibly affecting the separation of church and state. Under the *Lemon* test, a mixed motive statute passes the first prong, which only requires "*a* secular legislative purpose." *Lemon*, 403 U.S. at 612 (emphasis added). The analysis then moves to the second prong where the State must show that the statute's "primary *effect* neither advances not inhibits religion." *Id.* (emphasis added). The treatment of mixed motives under the dormant Commerce Clause should be similar. If the statute has *a* legitimate purpose, then the focus should be on its *effects*. If it does not discriminate, and if its local benefits outweigh its burden on interstate commerce, then the statute should be upheld.

In sum, three of the statutes at issue – Daily Cap, Trucking Certification and Four Axle – are the product of

11/30/01 FRI 17:13 FAX 402 341 8712 COCKLE PRINTING 032

mixed motives. Although the statutes are neutral on their face and do not have proven discriminatory effects, the court of appeals subjected them to strict scrutiny. This petition presents important constitutional questions about the appropriateness of such an approach. Certiorari should be granted in order to answer these questions.

II. THE COURT SHOULD DECIDE WHETHER A STATE, IN THE EXERCISE OF ITS SOVEREIGN POWERS OVER HEALTH AND SAFETY, IS REQUIRED TO GIVE PREFERENTIAL TREATMENT TO GOODS FROM PARTICULAR STATES.

Although this Court previously has determined the constitutionality of the States' attempts to regulate MSW, *see, e.g., Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. 353 (1992); *Chemical Waste Management v. Hunt*, 504 U.S. 334 (1992); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), this petition is fundamentally different from previous cases. While *Fort Gratiot*, *Chemical Waste*, and *Philadelphia* all involved vague and amorphous assertions about alleged dangers to the public health, the court of appeals expressly concluded that Virginia imposes more stringent regulations on MSW than other States. *See* App. 42-44. Thus, the court of appeals acknowledged that MSW from other States is more dangerous to the public health than MSW from Virginia, and that Virginia has a legitimate public health concern that could justify a restriction on interstate commerce. *See* App. 44. In sum, to the extent that it burdens interstate commerce, the Daily Cap statute is justified by a legitimate public health concern. As explained below, that public health concern is sufficient to justify the statute.

Yet, the court of appeals, in a radical departure from this Court's previous decisions, held that the Daily Cap statute was unconstitutional. Instead of allowing Virginia

11/30/01 FRI 17:14 FAX 402 341 8712 COCKLE PRINTING 033

to limit all MSW, regardless of source, as a means of protecting the public health, the court of appeals declared that the Constitution requires Virginia to treat MSW differently, depending upon the State of origin. The court of appeals said:

> If a state enacts a statute that purposely discriminates against interstate commerce in an effort to address a concern other than economic or resource protectionism, the second prong of the strict scrutiny test requires that the statute impose the least burden possible on interstate commerce. In other words, *rather than discriminating against MSW from every state other than Virginia, Virginia's cap should only target the MSW from states that have lesser health and safety standards regarding MSW than Virginia.*

App. 47-48 (emphasis added). In other words, if Virginia wishes to protect its sovereign interest in public health, it must design a complex scheme whereby the regulation of MSW depends upon the State of origin. This approach is constitutionally problematic for three reasons.

First, the court of appeals' decision is contrary to *Taylor*, where this Court explicitly recognized that a State could *ban* articles in interstate commerce as a means of protecting its sovereign interests in public health. In upholding a statute that banned *all* baitfish from *all other States* on public health grounds, this Court observed:

> The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values. *As long as a State does not needlessly obstruct interstate trade or attempt to "place itself in a position of economic isolation," it retains broad regulatory authority to protect the health and safety of its citizens* and the integrity of its natural resources.

11/30/01 FRI 17:14 FAX 402 341 8712 COCKLE PRINTING 003

Taylor, 477 U.S. at 151 (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935)) (emphasis added). *See also Fort Gratiot*, 504 U.S. at 367 (striking down Michigan law restricting out-of-state garbage, but noting "our conclusion would be different if the imported waste raised health or other concerns not presented by Michigan waste"). In other words, a State's sovereign interest in the preservation of the public health and safety can justify a *total ban* on a particular product from all other States. Virginia seeks not a total ban on MSW, but a much more modest, daily cap.

This Court's approval of a *total* ban on a particular product from all States stands in stark contrast to the court of appeals' interpretation. In *Taylor*, this Court never implied that Maine must take baitfish from some particular States while banning baitfish from other States, yet the court of appeals effectively adopted such a rule. Instead of a uniform rule that applies to all MSW, regardless of source, the court of appeals held that Virginia must favor MSW from certain States while discriminating against MSW from other States.

Second, if the MSW comes from a State that has laws as stringent as Virginia, the court of appeals held that the MSW is entitled to preferential treatment in the form of an exemption from the daily cap. In effect, Virginia is required to presume that private parties have complied with the laws of other States. This is unreasonable, especially since Virginia subjects its own, intrastate waste to the daily cap. This problem might be alleviated if the States of origin certified that specific MSW shipments had been inspected by state officials and complied with state laws, but the record shows no such certification process. Moreover, when a private party delivers MSW that comes from several States, Virginia will have no way of determining the State of origin. It will have to accept the declarations of the private party as to which MSW came

11/30/01 FRI 17:14 FAX 202 311 8712 COCKLE PRINTING 035

from which States. Furthermore, because acceptance or rejection of the MSW may depend upon identity of its State of origin, private parties may misrepresent the true origin. In effect, Virginia will never know for certain what dangers may or may not be lurking in the MSW that is allegedly from preferred States. In short, Virginia will lose control of the content of its landfills, and its sovereign interest in regulating the public health will be compromised.

Third, as a practical matter, the court of appeals' decision makes it impossible for Virginia to protect the public health. The regulatory scheme required to deal with the court of appeals' interpretation is an administrative nightmare. As an initial matter, Virginia officials will have to determine whether another State has laws as stringent as Virginia. Moreover, when Virginia or another State changes its laws, a new determination will have to be made. Because this issue will determine how much of a State's MSW is allowed into Virginia, other States and/or private parties inevitably will bring legal challenges to Virginia's determinations. Even if there is a broad consensus as to which States receive the preferential treatment, there are administrative difficulties. Conceivably, trucks bringing MSW from one State will be allowed to dump unlimited loads while trucks bringing MSW from another State will be forced to turn around, or only dump loads meeting daily cap requirements. Moreover, as explained above, unscrupulous private parties may lie about the State of origin in order to dump their MSW in Virginia. When one fully understands the administrative difficulties involved in the court of appeals' interpretation, it becomes clear that this scheme cannot work. Therefore, the court of appeals' interpretation effectively precludes Virginia from securing the public health by regulating MSW.

11/30/01 FRI 17:15 FAX 402 341 8712 COCKLE PRINTING 038

III. THE COURT SHOULD CLARIFY WHETHER A STATE MAY INTERFERE WITH THE NATIONAL COMMON MARKET BY REQUIRING THE EXPORT OF UNDESIRABLE PRODUCTS.

This case offers the Court an opportunity to address an important "missing corner" of its dormant Commerce Clause jurisprudence. In other import-export contexts, the rule is clear: Absent extraordinary circumstances, States may not interfere with the free movement of goods as dictated by the laws of supply and demand. This case presents the question whether the same rule applies when the interference undertaken by a State involves requiring the export of undesirable goods. It is an important federal issue that has not been, but should be, decided by this Court.

It is beyond debate that the "purpose of the Commerce Clause was to create an area of free trade among the several States." *Westinghouse Elec. Corp.*, 466 U.S. at 402-03. The Constitution creates a national common market among the States whereby goods and services are allocated based on economic principles rather than self-serving, protectionist policies of individual States. In this national common market, the decision whether goods and services remains in-state or flow to another State is not determined by government fiat but by the economic laws of supply and demand. As this Court observed more than fifty years ago:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.

11/30/01 FRI 17:15 FAX 402 341 8712 COCKLE PRINTING 037

H.P. Hood & Sons, 336 U.S. at 539. *See also Philadelphia*, 437 U.S. at 628 ("It does not matter that the State has shut the article of commerce inside the State in one case and outside the State in the other. What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade.").

The fact that our Constitution creates a national common market necessarily means that, absent special circumstances, individual States may *neither restrict nor require* interstate trade. The States must be neutral and allow goods and services to be distributed according to the laws of economics. Yet, almost from the beginning, the States have taken affirmative steps to distort interstate trade. These attempts to interfere with the national common market have taken four forms. Three of those forms have been explicitly recognized by this Court and have been held to be contrary to the fundamental law of our Nation. The fourth form, which is the subject of this petition, has never been addressed by this Court.

First, a State might attempt *to restrict the importation* of products that the State deems undesirable. *See Philadelphia*, 437 U.S. at 629. The motivation for such barriers may be to assist in-State businesses avoid competition, or to avoid the importation of products otherwise deemed undesirable. Although the States have made numerous attempts to exclude products from other States, this Court has consistently invalidated such attempts. *See Baldwin*, 294 U.S. at 522-24.

Second, a State might attempt to *restrict the exportation* of products it deems desirable. The motivation for such restrictions is typically a desire to keep certain valuable products within the State and thereby benefit local consumers. Yet, this Court has declared that a "State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce

11/30/01 FRI 17:15 FAX 402 341 8712 COCKLE PRINTING 038

on the ground that they are required to satisfy local demands or because they are needed by the people of the State." *Foster-Fountain Packing Co. v. Hayed*, 278 U.S. 1, 10 (1928). Consequently, this Court has consistently invalidated such export restrictions. *See H.P. Hood & Sons*, 336 U.S. at 545 (invalidating attempt by New York State to inhibit exportation of milk).

Third, in rare instances, a State might attempt to *require the importation* of products that it deems desirable, or at least, require that they be imported, if at all, on terms more favorable than what the free market would provide. *See Healy v. Beer Institute, Inc.*, 491 U.S. 324, 339 (1989) (striking law requiring out-of-state beer shippers to affirm that their posted prices were no higher than prices in bordering states).

Fourth, a State might attempt to *require the exportation* of products that it deems undesirable. This final scenario is the "missing corner" that is the subject of this petition. The motivation for such a restriction would be a State's desire to rid itself of certain products so that local industry or consumers might benefit. For example, if a State had a number of diseased cattle, it might pass a law that forced its farmers to export the sick animals to another State. Here, the Commonwealth has alleged that New York is requiring the exportation of its waste, a product that is, by definition, undesirable. The Commonwealth was never allowed to prove its claim.

Although this Court has never confronted a State's attempt to require exportation of undesirable products, there is little doubt that such interference with the national common market is unconstitutional. This is shown by the following:

a. The very philosophical basis for our Union was the desire to have a national common market. As this Court has recognized.

11/30/01 FRI 17:15 FAX 402 341 8712 COCKLE PRINTING 039

> When victory relieved the Colonies from the pressure for solidarity that war had exerted, a drift toward anarchy and commercial warfare between states began. ' * * * each state would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view.' This came 'to threaten at once the peace and safety of the Union.' The sole purpose for which Virginia initiated the movement which ultimately produced the Constitution was 'to take into consideration the trade of the United States; to examine the relative situations and trade of the said states; to consider how far a uniform system in their commercial regulation may be necessary to their common interest and their permanent harmony' and for that purpose the General Assembly of Virginia in January of 1786 named commissioners and proposed their meeting with those from other states.

H.P. Hood & Sons, 336 U.S. at 533 (citations omitted).

b. As a historical matter, it is clear that the philosophical basis for the national common market was Adam Smith's WEALTH OF NATIONS.[8] In that monumental work, Smith observed:

---

[8] So strong was the influence of Adam Smith that, in 1791, four years after the Commerce Clause was written, Congress rejected Alexander Hamilton's *Report on Manufacturers* in part because he contradicted the economic principles set forth in WEALTH OF NATIONS. JOHN S. PANCAKE, THOMAS JEFFERSON AND ALEXANDER HAMILTON 172 (1974). In 1796, this Court, speaking through Justice William Patterson, who had served as a Delegate to the Constitutional Convention from New Jersey, relied on WEALTH OF NATIONS in interpreting the concept of "direct tax" as intended by the Constitution. *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175-181 (1796). *See also* LEONARD LEVY, ORIGINAL INTENT AND THE FRAMERS CONSTITUTION 68-69 (1988).

11/30/01 FRI 17:16 FAX 402 341 8712 COCKLE PRINTING 040

> [T]he great object of the political economy of [every State] is to increase the riches and the power of that [State]. It ought, therefore, to give no preference nor superior encouragement to the foreign trade of consumption above the home trade; nor to the carrying trade above either of the two. *It ought neither to force nor to allure into either of those two channels a greater share of the capital of the [State] than what would naturally flow into them of its own accord.*

ADAM SMITH, WEALTH OF NATIONS 472 (1776, Penguin Classic ed. 1986) (emphasis added). In other words, if the "invisible hand" of supply and demand would not cause a product to enter interstate commerce, the State cannot take measures to force the product across state lines. For one State deliberately to "dump" unwelcome products across state boundaries violates free trade just as much as erecting unjustifiable barriers to keep out undesirable products from other States. The affront to federalism is compounded when a State engages in dumping in order to impose on a sister State burdens arising from one of its own essential governmental functions, such as the disposal of MSW.

c The principle that a State may not force undesirable products into another State has already been recognized in context of banishment. "To permit one State to dump its convicted criminals into another would . . . disturb that fundamental equality of political rights among the several States which is the basis for the Union itself. . . . [It] is impliedly prohibited from public policy." *Michigan v. Barm*, 231 N.W. 95, 96 (Mich. 1930). *See also Rutherford v. Blankenship*, 468 F. Supp. 1357, 1360 (W.D. Va. 1979); *Massachusetts v. Pike*, 701 N.E.2d 951, 960 (Mass. 1998). So, too, are federalism and public policy violated if a state "banishes" its garbage by flouting principles of free trade. *Pike*, 701 N.E.2d at 960 (explicitly comparing "dumping" of criminals with dumping of solid waste,

11/30/01 FRI 17:16 FAX 402 341 8712 COCKLE PRINTING 041

and rejecting both as violations of "constitutional principles and interstate comity").

d. Finally, additional support for the idea that States may not require the exportation of undesirable goods is found, by analogy, in treaties establishing the World Trade Organization, the European Union, and the North American Free Trade Agreement. All explicitly prohibit various forms of dumping. *See Final Act Embodying the Result of the Uruguay Round of Multilateral Trade Negotiations*, Apr. 15, 1994, 33 I.L.M. 1125 (1994); *Treaty on European Union*, Feb. 7 1992, 31 I.L.M. 247 (1992); *North American Free Trade Agreement*, Dec. 17, 1992, 32 I.L.M. 289 (1992). It would be odd indeed if the United States Constitution, which established the world's oldest and most successful common market and which did so under a common government, were less advanced in its economic principles than more recent free trade agreements among international states remaining wholly separate. Since dumping violates the principles of free trade on which our more perfect Union was created, it violates the Commerce Clause and is unconstitutional. To say otherwise is to say that Constitution does not create a national common market.

This issue of whether *requiring exports* is constitutional is not simply an academic exercise. It has profound implications for this petition. Virginia alleges that New York and/or New York State have pursued policies designed to *require the exportation* of MSW from New York to Virginia, in violation of the fundamental law of our Union. The respondents' contracts with New York City to transfer MSW to Virginia are the direct result of such unconstitutional conduct. Such contracts are enforceable as a matter of public policy. *See Shelley v. Kraemer*, 334 U.S. 1, 20-21 (1948) (holding that courts may not enforce racially restrictive covenants). Most significantly, as the Commonwealth alleged, but was never allowed to prove,

the respondents have "unclean hands" and the "harm" suffered by them is not a "cognizable injury." J.A. 160-61 and 179-80. Thus, they lack standing to challenge the constitutionality of the MSW statutes. The judgment below must be vacated and, upon proof of the Commonwealth's allegations, the matter must be dismissed.

In sum, the issue of whether *requiring exports* violates the Constitution goes to the very foundations of the respondents' claims. If *requiring exports* violates the Constitution and if Virginia can prove that New York and/or New York City engaged in such conduct, then the respondents' claims collapse like a house of cards. Under the circumstances, this Court should determine whether *requiring exports* violates the dormant Commerce Clause and, if so, should remand the matter so that Virginia may develop its affirmative defenses.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this 30th day of October 2001.

RANDOLPH A. BEALES
Attorney General of Virginia

WILLIAM H. HURD
Solicitor General
Counsel of Record

RICHARD CAMPBELL
Deputy Attorney General

JOHN BUTCHER
ROGER L. CHAFFE
Senior Assistant Attorneys General

WILLIAM E. THRO
Special Assistant Attorney General

900 East Main Street
Richmond, Virginia 23219
(804) 786-2436 (voice)
(804) 371-0200 (facsimile)

11/30/01 FRI 17:42 FAX 202 341 8712 COCKLE PRINTING 047

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WASTE MANAGEMENT HOLDINGS, INCORPORATED; HALE INTERMODAL MARINE COMPANY; WEANACK LAND LIMITED PARTNERS; CHARLES CITY COUNTY; BRUNSWICK WASTE MANAGEMENT FACILITY, Plaintiffs-Appellees, v. JAMES S. GILMORE, III, in his official capacity as Governor of the Commonwealth of Virginia; JOHN PAUL WOODLEY, JR., in his official capacity as Secretary of Natural Resources; DENNIS TREACY, JR., in his official capacity as Director of the Virginia Department of Environmental Quality, Defendants-Appellants. GLEN BESA; CAMPAIGN VIRGINIA; JOHN H. HAGER, Honorable; EMILY COURIC, Senator; MARGARET WHIPPLE, Senator; BRUCE JAMERSON; MARK A. MINER; LILA YOUNG, Movants.
No. 00-1185

252 F.3d 316; 2001 U.S. App. LEXIS 11573; 52 ERC (BNA) 1818

December 7, 2000, Argued
June 4, 2001, Decided

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. James R. Spencer, District Judge. (CA-99-425, CA-99-443).

DISPOSITION: AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

COUNSEL: ARGUED: Stewart Todd Leeth, Assistant Attorney General, Richmond, Virginia, for Appellants.

Evan Mark Tager, MAYER, BROWN & PLATT, Washington, D.C.; Timothy George Hayes, HUNTON & WILLIAMS, Richmond, Virginia, for Appellees.

ON BRIEF: Mark L. Earley, Attorney General of Virginia, William H. Hurd, Solicitor General, Roger L. Chaffe, Senior Assistant Attorney General, Ellen F. Brown, Assistant Attorney General, William E. Thro, Assistant Attorney General, Richmond, Virginia, for Appellants.

Kenneth S. Geller, Miriam R. Nemetz, MAYER, BROWN & PLATT, Washington, D.C.; D. Alan Rudlin, Shawn A. Copeland, HUNTON & WILLIAMS, Richmond, Virginia; Jason S. Thomas, HUNTON & WILLIAMS, Raleigh, North Carolina; B. Randolph Boyd, RANDOLPH, BOYD, CHERRY & VAUGHAN, Richmond, Virginia, for Appellees.

JUDGES: Before WIDENER and KING, Circuit Judges, and HAMILTON, Senior Circuit Judge. Senior Judge Hamilton wrote the opinion. Judge Widener wrote a concurring opinion (specifying that he concurs in all parts of the court's opinion except Part IV.A, but concurs in the result that Part IV.A obtains). Judge King wrote an opinion concurring in part and dissenting in part.

OPINION BY: HAMILTON

OPINION: HAMILTON, Senior Circuit Judge:

In March and April 1999, the Commonwealth of Virginia's (Virginia) General Assembly, its legislative body, enacted and the Governor of Virginia signed into law five statutory provisions, which, collectively, cap the amount of municipal solid waste (MSW) that may be accepted by

landfills located in Virginia and restrict the use of barges and trucks to transport such waste in Virginia. *See* Va. Code Ann. §§ 10.1-1408.1(Q); 10.1-1408.3; 10.1-1454.1(A); 10.1-1454.2, 10.1-1454.3 (Michie Supp. 2000). The first statutory provision (the Cap Provision) caps the amount of waste that any landfill located in Virginia may accept.[1] Va. Code Ann. § 10.1-1408.3. The second statutory provision (the Stacking Provision) requires Virginia's Waste Management Board (the Board) to promulgate regulations governing the transport of MSW by ship, barge, or other

---

[1] Under the Cap Provision, the amount of MSW a landfill located in Virginia may accept is capped at either: (1) 2,000 tons per day or (2) the average amount accepted by the landfill in 1998, whichever is greater. Va. Code Ann. § 10.1-1408.3. The Cap Provision also authorizes Virginia's Waste Management Board to grant individual requests for exceptions if, after considering "the potential human health, environmental, transportation infrastructure, and transportation safety impacts and needs," it determines that "(i) [an exception] protects present and future human health and safety and the environment; (ii) there is a need for the additional capacity; (iii) sufficient infrastructure will exist to safely handle the waste flow; (iv) the increase is consistent with locality-imposed or state-imposed daily disposal limits; (v) the public interest will be served by [the increase]; and (vi) the additional capacity is consistent with regional and local solid waste management plans developed pursuant to § 10.1-1411." *Id.* (incorporating factors set out in amended version of § 10.1-1409.1(D)). In addition to these factors, Virginia's Waste Management Board must also consider "other factors it deems appropriate to protect the health, safety and welfare of the people of Virginia and Virginia's environmental and natural resources." *Id.* Virginia's Waste Management Board may not approve an exception from the cap "until a public hearing on the proposed increase has been held in the locality where the landfill requesting the increase is located." *Id.*

11/30/01 FRI 17:30 FAX 402 341 8712 COCKLE PRINTING 002

vessel, as well as the loading and unloading of such waste. Va. Code Ann. § 10.1-1454.1(A). This statutory provision requires that such regulations, which have yet to be issued, prohibit stacking containerized waste on a barge more than two containers high. *Id.* The third statutory provision (the Three Rivers' Ban), which pertains to barges, prohibits "the commercial transport of hazardous or nonhazardous solid waste . . . by ship, barge or other vessel upon the navigable waters of the Rappahanock, James and York Rivers, to the fullest extent consistent with limitations posed by the Constitution of the United States." Va. Code Ann. § 10.1-1454.2. The fourth statutory provision (the Tracking Certification Provision) prohibits landfill operators from accepting MSW from a vehicle with four or more axles "unless the transporter of the waste provides certification, in a form prescribed by the Board, that the waste is free of substances not authorized for acceptance at the facility." Va. Code Ann. § 10.1-1408.1(Q). Finally, the fifth statutory provision (the Four or More Axle Provision) requires the Board to develop regulations governing the "commercial transport" of MSW by "any tractor truck semitrailer combination with four or more axles." Va. Code Ann. § 10.1-1454.3(A), (D). Among other things, the Four or More Axle Provision provides that the new regulations require, as a condition of carrying MSW on Virginia roads, the owners of such trucks to make financial assurances that trucks having less than four axles or carrying other cargo need not make. *Id.* § 10.1-1454.3(A)(2).

Following the enactment of these statutory provisions, several Virginia landfill operators and transporters

11/30/01 FRI 17:30 FAX 402 341 8712 COCKLE PRINTING 003

of MSW and one Virginia county (collectively the Plaintiffs)[2] commenced this 42 U.S.C. § 1983 action in the United States District Court for the Eastern District of Virginia against the following individuals, in their official capacities: (1) Virginia's Governor, James Gilmore; (2) Virginia's Secretary of Natural Resources, John Paul Woodley; and (3) Virginia's Director of the Department of Environmental Control, Dennis Treacy.[3] The Plaintiffs' action challenges the five Virginia statutory provisions on the basis that they are violative of the dormant Commerce, Contract, and Equal Protection Clauses of the United States Constitution.[4] The action seeks declaratory and injunctive relief.

---

[2] The Plaintiffs are: (1) Waste Management Holdings, Inc. (Waste Management), whose affiliates operate several large landfills in Virginia that accept substantial quantities of MSW generated outside Virginia, (2) Weanack Land Limited Partners (Weanack), which owns a transfer facility on the James River where containerized shipments of MSW are offloaded from barges and onto tractor trailers; (3) Hale Intermodal Marine Company (Hale), a barging company that transports, among other things containerized MSW, (4) Charles City County, which owns property that it leases to Waste Management for use as a landfill; and (5) Brunswick Waste Management Facility, L.L.C. (Brunswick), which owns and operates a large landfill in Brunswick County, Virginia

[3] For ease of reference, we refer to these defendants collectively as "the Defendants."

[4] Hale challenges two of the Virginia statutes, the Three Rivers' Ban and the Stacking Provision, on the basis that these statutes are violative of the Supremacy Clause of the United States Constitution.

11/30/01 FRI 17:30 FAX 402 341 8712 COCKLE PRINTING 004

In a published decision dated February 2, 2000, the district court held that the five Virginia statutory provisions at issue were violative of the Constitution's dormant Commerce Clause, and that the Three Rivers' Ban and the Stacking Provision were violative of the Constitution's Supremacy Clause. *Waste Management Holdings, Inc. v. Gilmore (Waste Management Holdings III)*, 87 F. Supp. 2d 536, 545 (E.D. Va. 2000). Before this court, on several fronts, the Defendants challenge the propriety of this decision of the district court.[5] For the reasons stated below, we affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

I.

MSW "generally includes solid waste generated by households, commercial activities, institutions, and non-process waste from industries." (J.A. 249). The Virginia Department of Environmental Quality (DEQ) reported that as of November 1998, there were seventy active landfills in Virginia accepting MSW. Although the parties disagree over how many of those landfills accept MSW from other states, the record is clear that seven "regional" landfills account for ninety-seven percent of the out-of-state waste deposited in Virginia. Approximately sixty-

---

[5] In a published decision dated August 30, 1999, the district court dismissed the Contract Clause claims under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. *Waste Management Holdings, Inc. v. Gilmore (Waste Management II)*, 64 F. Supp. 2d 537, 548 (E.D. Va. 1999). On April 11, 2000, the district court sua sponte dismissed the Plaintiffs' claims under the Equal Protection Clause. The propriety of these decisions is not before the court.

11/30/01 FRI 17:31 FAX 402 341 8712 COCKLE PRINTING 005

one "local" landfills accept no out-of-state waste at all. DEQ also reported that for the calendar year ending December 31, 1998, New York, Maryland, North Carolina, and Washington, D.C. exported the largest quantities of MSW into Virginia compared to other states or jurisdictions.

The regional landfills, which are privately operated and have substantially greater disposal capacity than their local counterparts, have been sited and constructed over the past decade in order to comply with strict state and federal regulations. Pursuant to a "host agreement" with the county in which it is located, each regional landfill pays the host county a fee based upon the volume of waste (excluding the host's waste) deposited at that location. These agreements also require the regional landfills to perform certain services for their host communities, such as providing free waste disposal and recycling services and/or funding the closing of any local landfills which do not meet state and federal regulations. The construction of these regional landfills has required tens of millions of dollars in private investment, and the landfills face high operation and maintenance costs in addition to the sizeable host fees.

To meet their revenue needs and remain economically viable, each regional landfill relies heavily on the disposal of MSW generated outside Virginia. In fact, MSW generated outside Virginia comprises seventy-five percent of the MSW accepted at the five regional landfills

11/30/01 FRI 17:31 FAX 402 341 8712 COCKLE PRINTING 006

operated by Waste Management[6] and almost one-hundred percent of the MSW accepted at Brunswick's regional landfill.

Under its host agreements, Waste Management is permitted to dispose of over 2,000 tons of MSW per day at all but one of its regional landfills. Prior to enactment of the statutory provisions at issue, Waste Management expected to exceed that level in 1999. Waste Management further expected that three of its five regional landfills would accept substantially more waste in 1999 than they had in 1998. The Charles City County Landfill, for instance, accepted approximately 2,849 tons of MSW per day in 1999, compared to less than 2,000 tons per day in 1998. Likewise, Brunswick accepted approximately 2,400 tons per day in 1998, and accepted more than 2,800 tons per day in 1999. Before the enactment of the statutory provisions at issue, Brunswick had expected to reach 5,000 tons per day by the end of the year 2000. By contrast, not one of the sixty-one landfills located in Virginia that accept only Virginia-generated MSW has ever accepted more than 2,000 tons per day, and only one or two of those might ever be expected to reach that level in the future.

---

[6] Waste Management operates the following regional landfills: the Charles City County Landfill; the King George County Landfill and Recycling Facility; the Maplewood Recycling and Waste Disposal Facility, located in Amelia County; the Middle Peninsula Landfill and Recycling Center, located in Gloucester County; and the Atlantic Waste Disposal Landfill in Sussex County.

11/30/01 FRI 17:31 FAX 402 311 8712 COCKLE PRINTING 007

For several decades, New York City has disposed of its residential MSW at the Fresh Kills Landfill in Staten Island. In 1997, New York Governor George Pataki and New York City Mayor Rudolph Giuliani announced that the Fresh Kills Landfill would cease accepting waste in December 2001. The New York City Department of Sanitation, therefore, began to negotiate interim disposal contracts in order to phase out its dependency on the Fresh Kills Landfill. Waste Management has been awarded two of those contracts, and much of the MSW handled under those two contracts has been deposited at its regional landfills in Virginia. In March 1999, it bid on a third contract, which also contemplates the disposal of New York-generated MSW in Virginia. More significantly, Waste Management has bid on, and is a primary contender for, a twenty-year contract to dispose of all or part of 12,000 tons of residential waste per day from Manhattan, Queens, Brooklyn, and the Bronx. New York City's Department of Sanitation's Request For Proposal expresses a preference that any waste removed under this contract be transported by barge and/or rail, rather than by truck.

Waste Management's response contemplates sending sixty percent of the New York City residential MSW to Virginia landfills, particularly the Charles City County Landfill. It also contemplates that most of this waste will be containerized and transported by barge along the James River for off-loading at the James River Facility. In addition to the residential MSW covered by existing and pending contracts, Waste Management also removes significant quantities of commercial waste per day from New York City and surrounding communities. Waste

11/30/01 FRI 17:31 FAX 402 341 8712 COCKLE PRINTING 008

Management had transported a substantial portion of this MSW to its regional landfills in Virginia by tractor trailer, but in 1998 began planning to transport much of the waste by barge. In furtherance of this plan, it negotiated a contract with Hale, whereby Hale would lease to Waste Management four barges for five years at a fixed price, with an option to lease an additional two barges. Each barge is capable of carrying 5,000 tons of MSW in specially constructed containers that can be stacked five high.

Hale and Waste Management expected that barging would commence in March or April 1999, that Waste Management would transport 2,500 to 3,000 tons of MSW per day from Brooklyn to the James River Facility, and that this waste would then be unloaded and delivered to the Charles City County Landfill for disposal. Toward this end, Waste Management has agreed to purchase 400 American Bureau of Shipping-approved, double steel walled containers at a cost of $10,000 per container. It has also invested more than $5,000,000 in improvements at the James River facility and has guaranteed payment on two cranes for off-loading containers that together are worth more than $5,000,000. Only a small amount of MSW generated inside Virginia is transported to Virginia landfills by water.

In June 1998, the DEQ issued a report (the 1998 DEQ Report) indicating that, during the fourth quarter of 1997 alone, Virginia had imported 788,000 tons of MSW. Around the same time, Waste Management's plans to significantly increase its importation of New York City's MSW into Virginia began to attract greater notice. In July 1998, Virginia State Senator Bill Bolling, chief sponsor of

11/30/01 FRI 17:32 FAX 402 341 8712 COCKLE PRINTING 009

the statutory provisions at issue in this appeal, wrote to Virginia Attorney General Mark Earley about the possibility of blocking those plans:

> With the impending closure of the Fresh Kills Landfill in New York, I am concerned that the pressure for additional importation will increase even more in the next few years. If it is legally possible to do so, I would like to introduce legislation during the 1999 session of the General Assembly that would place restrictions on such importations.
>
> The legislation I am currently considering could take a number of forms. This legislation could seek to prohibit the importation of out of state waste altogether. In the alternative, I may seek to limit such importations to those landfills currently receiving out of state waste, and to levels reflective of their current importations. However, I do not want to propose such legislation if it would be in violation of existing federal or state law.
>
> (J.A. 576).

In August 1998, the Congressional Research Service issued a report indicating that Virginia now ranked second only to Pennsylvania as the nation's largest importer of MSW, taking in 2,800,000 tons in 1997. Shortly thereafter, on September 30, 1998, Senator Bolling announced his intention to introduce legislation aimed at out-of-state waste importation when the General Assembly reconvened in January 1999. In support of his proposals, Senator Bolling highlighted the Commonwealth's newly acquired ranking among waste-importing states, Waste Management's recently announced contract to remove

11/30/01 FRI 17:32 FAX 402 341 8712 COCKLE PRINTING 010

2,400 tons of residential MSW per day from New York City, "most if not all of [which] will be transported by barge on Virginia's waterways," and the impending closure of the Fresh Kills Landfill. (J.A. 601). "New York officials have made no secret of their intent to export the 14,000 tons of garbage a day that are currently disposed of in the Fresh Kills Landfill to other states. It appears as though the vast majority of this garbage may be heading to Virginia as well," Senator Bolling warned. *Id.*

Governor Gilmore also expressed concern about the increased flow of MSW generated outside Virginia into landfills located in Virginia. On September 29, 1998, he announced that he was dispatching his top environmental officials to meet with their counterparts from other states "to ensure that Virginia does not drown in a regional sea of garbage." (J.A. 597). In November 1998, Governor Gilmore imposed a moratorium on new landfill development and instructed Secretary Woodley to recommend legislation to deal with the problem. Furthermore, in his January 13, 1999 State of the Commonwealth address, Governor Gilmore proposed such legislation. Specifically referring to Waste Management's intentions, he noted that "just two days ago, a major company announced plans to import four thousand more tons of New York City trash into Virginia per day." (J.A. 630). To combat this increase, he announced that he would ask Virginia's General Assembly to take the following steps: (1) to prohibit the use of barges for transporting MSW on Virginia's waterways, (2) to impose new permit requirements for landfills located in Virginia; (3) to cap the amount of waste that may be deposited in Virginia landfills; and (4) to increase inspections of waste being hauled

11/30/01 FRI 17:32 FAX 402 341 8712 COCKLE PRINTING 011

by truck or other means. And when New York City Mayor Giuliani suggested that Virginia might have an obligation to accept New York City's MSW, Governor Gilmore responded that "the home state of Washington, Jefferson, and Madison has no intention of becoming New York's dumping grounds." (J.A. 635). Meanwhile, numerous Virginia lawmakers and other state officials announced their support for Senator Bolling and the Governor's efforts, frequently couching their positions in anti-out-of-state MSW terms.

In March and April 1999, Virginia's General Assembly approved and Governor Gilmore signed into law the five statutory provisions at issue in this case. The present civil action followed. On June 30, 1999, in a published decision, the district court granted the Plaintiffs' motion for a preliminary injunction against the Defendants' enforcement of the Cap Provision, the Stacking Provision, and the Three Rivers' Ban, pending resolution of the Plaintiffs' claims. *Waste Management Holdings, Inc. v. Gilmore* (*Waste Management I*), 64 F. Supp. 2d 523 (E.D. Va. 1999). In granting the motion, the district court held the Plaintiffs had made the necessary showing of irreparable harm and the balance of harms tipped in their favor. *Id.* at 537. The district court further held that the Plaintiffs would almost certainly succeed on the merits. *Id.* According to the district court, "the challenged provisions constitute 'an integrated and interconnected discriminatory program' whereby Virginia has 'attempted to isolate itself from a problem common to [the nation] by erecting a barrier against the movement of interstate trade.'" *Id.* (quoting *Environmental Tech. Council v. Sierra Club*, 98 F.3d 774, 786 (4th Cir. 1996)) (alteration in original). "This,"

11/30/01 FRI 17:32 FAX 402 341 8712 COCKLE PRINTING 012

the district court held, "is precisely what the Commerce Clause forbids." *Waste Management I*, 64 F. Supp. 2d at 539. The Defendants filed a notice of appeal and a motion in our court for a stay of the preliminary injunction pending appeal. We denied the motion, and the Defendants withdrew their appeal.

On August 24, 1999, the district court granted the Plaintiffs' motion to strike the Defendants' asserted affirmative defense that because New York City had allegedly taken affirmative steps to discourage the disposal of New York City generated MSW within the borders of the State of New York, the Plaintiffs' constitutional challenges were barred insofar as they arose from their interest in importing solid waste from New York City. The Defendants next filed a motion to dismiss for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). The Defendants sought dismissal of the entirety of the Plaintiffs' complaint on two bases: (1) that the Plaintiffs lacked standing to challenge the disputed laws because Virginia's counties lacked authority (i.e., ultra vires) to enter into the landfill host agreements; and (2) that the Plaintiffs' action is barred by the doctrine of sovereign immunity as provided in the Eleventh Amendment. In addition, the Defendants contended that each of the Plaintiffs' claims should be dismissed for failure to state a claim on the merits. Finally, the Defendants contended that Charles City County must be dismissed as a plaintiff because it lacked standing to sue its creator.

On August 30, 1999, in a published decision, the district court dismissed the Contract Clause claims for failure to state a claim, but denied the remainder of the

11/30/01 FRI 17:33 FAX 402 341 8712 COCKLE PRINTING 013

Defendants' Rule 12(b)(6) motion. *Waste Management Holdings, Inc. v. Gilmore (Waste Management II)*, 64 F. Supp. 2d 537, 548 (E.D. Va. 1999). The district court declined to address the issue of whether Charles City County should be dismissed as a plaintiff based on its (the district court's) belief that each of the other plaintiffs had standing to raise the claims alleged. *Id.* at 548.

Following the close of discovery, the Plaintiffs filed a motion for summary judgment with respect to their dormant Commerce Clause and Supremacy Clause claims. The Defendants filed a cross-motion for partial summary judgment with respect to the constitutionality of the Cap Provision. On February 2, 2000, again in a published decision, the district court granted the Plaintiffs' motion for summary judgment "in its entirety" and denied the Defendants' motion for partial summary judgment *Waste Management Holdings III*, 87 F. Supp. 2d 536, 545 (E.D. Va. 2000). Notably, the district court's memorandum opinion did not separately address the constitutionality of the Trucking Certification or the Four or More Axle Provision under the dormant Commerce Clause or the Three Rivers' Ban or the Stacking Provision under the Supremacy Clause. For reasons not relevant to the present appeal, the district court later sua sponte dismissed the Plaintiffs' claims under the Equal Protection Clause. The Defendants noted a timely appeal.

II.

Under Federal Rule of Civil Procedure 56, a court should grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and

11/30/01 FRI 17:33 FAX 402 341 9712 COCKLE PRINTING 014

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, the district court should review all of the evidence in the record. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 2110, 147 L. Ed. 2d 105 (2000). "In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Id.*

Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses."

Id. (quoting 9A Charles Allan Wright & Arthur R. Miller, Federal Practice and Procedure § 2529, p. 299 (2d ed. 1995)). We review de novo a district court's decision to grant a motion for summary judgment. *Myers v. Finkle*, 950 F.2d 165, 167 (4th Cir. 1991).

III

The Defendants first argue the doctrine of sovereign immunity, as reflected in the Eleventh Amendment, bars the Plaintiffs' entire action. We disagree.

11/30/01 FRI 17:33 FAX 402 341 8712 COCKLE PRINTING 013

The Eleventh Amendment provides that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend XI. The Supreme Court has recognized that the doctrine of sovereign immunity under the Eleventh Amendment extends beyond the literal text of the Eleventh Amendment to prevent a state from being sued by one of its own citizens without its consent. *Alden v. Maine*, 527 U.S. 706, 727-28, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999). Accordingly, the present suit by the Plaintiffs' is barred by the Eleventh Amendment unless it falls within the exception recognized in *Ex Parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908), which permits certain suits in federal court against state officers.

Under the *Ex parte Young* exception, a suit in federal court to enjoin a state officer from enforcing an unconstitutional statute is not a suit against the state for purposes of the Eleventh Amendment. *Id.* at 159-60.

The theory of *Ex parte Young* is that because an unconstitutional statute is void, it cannot cloak an official in the state's sovereign immunity. Although the reasoning of *Ex parte Young* has never been extended to claims for retrospective relief, federal courts may grant prospective injunctive relief against state officials to prevent ongoing violations of federal law.

CSX Transp. Inc. v. Board of Public Works, 138 F.3d 537, 540 (4th Cir. 1998). The requirement that the violation of federal law be ongoing is satisfied when a state officer's

11/30/01 FRI 17:33 FAX 402 341 8712 COCKLE PRINTING 016

enforcement of an allegedly unconstitutional state law is threatened, even if the threat is not yet imminent. *Summit Medical Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1338-1341 (11th Cir. 1999), cert denied, 529 U.S. 1012, 146 L. Ed. 2d 233, 120 S. Ct. 1287 (2000).

Over three years ago, the Supreme Court held that the *Ex parte Young* doctrine cannot be used to allow a federal court to hear what is the functional equivalent of a quiet-title action against a state. *Idaho v. Coeur d' Alene Tribe of Idaho*, 521 U.S. 261, 138 L. Ed. 2d 438, 117 S. Ct. 2028 (1997). In the 1997 decision so holding, two of the Justices (Chief Justice Rehnquist and Justice Kennedy) called for a fundamental reconceptualization of *Ex parte Young*. If given the chance, they would limit the *Ex parte Young* "exception" to cases in which no state forum was available to decide whether federal law entitled the plaintiff to injunctive relief. *Coeur d' Alene*, 521 U.S. at 270-280 (Kennedy, J., joined by Rehnquist, C.J.). But this limitation of *Ex parte Young* was decisively rejected by the other seven Justices. *See* 521 U.S. at 287-295 (O'Connor, J., joined by Scalia and Thomas, JJ., concurring); 521 U.S. at 297 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting).

The Defendants acknowledge that Justice Kennedy and Justice Rehnquist's limiting view of the *Ex parte Young* doctrine in *Coeur d'Alene* "has not yet been adopted by the full Court." (the Defendants' Br. at 20). The Defendants nonetheless argue that we should apply it in the case before us to conclude that *Ex parte Young* does not prevent the Eleventh Amendment from barring the Plaintiffs' suit.

11/30/01 FRI 17:34 FAX 402 341 8712 COCKLE PRINTING 017

The fallacy of the Defendants' argument is obvious. Application of the *Ex parte Young* doctrine has not been limited to cases where no state forum is available to decide whether federal law entitles a plaintiff to injunctive relief. The case before us is precisely the type of case to which the *Ex parte Young* doctrine applies. *See*, e.g., *CSX Transp. Inc. v. Board of Public Works*, 138 F.3d 537, 541 (4th Cir. 1998) ("An injunction against the future collection of the illegal taxes, even those that already have been assessed, is prospective, and therefore available under the *Ex parte Young* doctrine."). Indeed, if a precedent of the Supreme Court has direct application in a case, yet appears to rest on reasons expressly rejected by a few or even a majority of the Justices in some other line of decisions, "the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989).

Next, the Defendants contend that even if the Eleventh Amendment does not bar the Plaintiffs' action altogether, Governor Gilmore should be dismissed as a party because he does not have direct enforcement responsibility with respect to the statutory provisions at issue. Below, both the Plaintiffs and the district court recognized that Governor Gilmore lacks direct enforcement authority with respect to the statutory provisions at issue. However, the Plaintiffs contended and the district court agreed that Governor Gilmore was a proper defendant because he actively and publicly defended the statutory provisions at issue. *Waste Management II*, 64 F. Supp. 2d at

11/30/01 FRI 17:34 FAX 402 341 8712 COCKLE PRINTING 018

543 n.6. On appeal, the Plaintiffs argue in favor of keeping Governor Gilmore in the suit on the same basis.

We agree with the Defendants that Governor Gilmore should be dismissed as a party. *Ex parte Young* requires a "special relation" between the state officer sued and the challenged statute to avoid the Eleventh Amendment's bar. *Ex parte Young*, 209 U.S. at 157. "General authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law." *Children's Healthcare is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1416 (6th Cir. 1996) (internal quotation marks omitted). Thus, "the mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute." *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979).

Here, although Governor Gilmore is under a general duty to enforce the laws of Virginia by virtue of his position as the top official of the state's executive branch, he lacks a specific duty to enforce the challenged statutes. Thus, we vacate the judgment against him and remand with instructions that the district court dismiss him as a defendant in this action. The fact that he has publicly endorsed and defended the challenged statutes does not alter our analysis. The purpose of allowing suit against state officials to enjoin their enforcement of an unconstitutional statute is not aided by enjoining the actions of a state official not directly involved in enforcing the subject statute.[7]

---

[7] Given our holding that Governor Gilmore should be

11/30/01 FRI 17:34 FAX 402 341 8712 COCKLE PRINTING 019

IV.

The Defendants next dispute the district court's conclusion that the Plaintiffs possess standing to challenge the statutory provisions at issue.

A.

According to the Defendants, Virginia counties have no authority to operate or contract for the operation of a landfill for profit that accepts MSW generated outside Virginia. Accordingly, they contend, the host agreements and the counties' actions with regard to acceptance of MSW generated outside Virginia are ultra vires. Since the host agreements form the basis for this litigation, the Defendants reason the Plaintiffs lack standing.

As the Defendants correctly assert, Virginia law follows "Dillon's Rule," which holds that a municipal corporation possesses only those powers that are: (1) expressly granted by Virginia, (2) necessarily or fairly implied in or incidental to the powers expressly granted, or (3) "essential to the declared objects and purposes of the corporation, not simply convenient but indispensable." *Richmond v. Board of Supervisors of Henrico County*, 199 Va. 679, 101 S.E.2d 641, 645 (Va. 1958) (internal quotation marks omitted). "Any fair, reasonable doubt concerning the existence

---

dismissed from this action. from this point forward. when our opinion refers to "the Defendants," we are referring to the two remaining defendants/appellants, John Paul Woodley and Dennis Treacy. We note that Governor Gilmore joined them in all arguments they have presented on appeal.

11/30/01 FRI 17:35 FAX 402 341 8712 COCKLE PRINTING 020

of the power is resolved by the courts against the corporation and the power is denied." *Id.*

Here, Virginia Code § 15.2-932 grants "any locality" authority "to contract with any person, whether profit or nonprofit, for garbage and refuse pickup and disposal service in its locality and to enter into contracts relating to waste disposal facilities which recover energy or materials from garbage, trash and refuse." Va. Code Ann. § 15.2-932 (Michie 1997) (emphasis added). The Defendants argue that applying Dillon's Rule to this statute results in the interpretation that Virginia counties lack the power to contract for waste disposal that is not their own waste.

We hold the district court properly rejected the Defendants' ultra vires argument. A plain reading of the language of Virginia Code § 15.2-932, even in light of Dillon's Rule, grants every Virginia county the authority to enter into the host agreements at issue. In this regard, we rely upon the following language: "any locality" has the authority "to contract with any person, whether profit or nonprofit, for garbage and refuse pickup and disposal services in its locality. . . ." *Id.* (emphasis added). Critically, this language does not limit the term disposal to disposal of intra locality garbage or refuse pickup as the Defendants suggest.

B

According to the Defendants, Waste Management and Brunswick lack standing to challenge the Cap Provision, because they did not first apply for an increase in their tonnage allotment under the variance provision. The

11/30/01 FRI 17:35 FAX 402 341 8712 COCKLE PRINTING 021

Defendants further argue that "it has even been conceded that, if the regional landfills had applied for increased tonnage allotments, DEQ staff probably would have granted those requests." (the Defendants' Br. at 29).

In support of this last argument, the Defendants cite the deposition testimony of Lee Wilson. Lee Wilson is employed as a district manager by USA Waste of Virginia, Inc., which is a subsidiary of Waste Management. In his district manager position, Lee Wilson is responsible for the operations of three landfills located in Virginia and a number of transfer stations. Among other things, his duties include developing and submitting bids to perform waste handling services for customers, providing services to Waste Management's customers, negotiating contracts with vendors, developing and implementing business plans, and dealing with federal, state, and local regulatory agencies and officials.

In deposition, Lee Wilson was asked to give his opinion "after working here in the State of Virginia and knowing the regulators and knowing your landfills, do you think they would grant you an extension?" Lee Wilson answered "from a regulatory standpoint, yes, from a political standpoint, no." (J.A. 1371).

The Defendants' argument that Waste Management and Brunswick lack standing to press their constitutional claims because they have not already applied for an increase in their tonnage allotment is without merit. If the cap is allowed to take effect, the maximum daily tonnage that Waste Management and Brunswick may receive at their landfills will be dramatically reduced. The Cap Provision would prevent Waste Management and Brunswick

11/30/01 FRI 17:35 FAX 402 341 9712 COCKLE PRINTING 022

from bidding on contracts while variance applications are pending. The prospect of such harm confers standing. *See Bob's Home Service, Inc. v. Warren County*, 755 F.2d 625, 627 (8th Cir. 1985) (cap prohibiting expansion of a waste disposal facility until granted a permit by the state presented justiciable controversy because cap denied plaintiffs the right to expand their operations in the future and implied an immediate injury, i.e., a reduction in the value of plaintiffs' land and business). As for the alleged concession by Waste Management that it would receive a waiver in its tonnage allotment, a fair reading of Lee Wilson's testimony reveals that he did not make such a concession. At most, Lee Wilson identified competing forces with opposing views on the matter. In short, the Defendants' contention that Waste Management and Brunswick lack standing to press their constitutional challenge to the Cap Provision is without merit.

C

Lastly with respect to standing, the Defendants argue the Plaintiffs lack standing to challenge the Stacking Provision, the Three Rivers' Ban, and the Four or More Axle Provision because respective saving clauses provide that these provisions will be implemented only to the extent allowed by federal law. Virginia Code Ann. § 10.1-1454.1 (barge regulations shall include stacking limits only "to the extent allowable under federal law"); § 10.1-1454.2 (Three Rivers' Ban will be enforced only to the "extent consistent with limitations imposed by the Constitution of the United States"); § 10.1-1454.3 (regulations under Four or More Axle Provision to be enforced only "to the extent allowable under federal law"). We disagree.

11/30/01 FRI 17:35 FAX 102 341 8712 COCKLE PRINTING 023

The saving clauses upon which the Defendants rely do not prevent the Plaintiffs from challenging the Stacking Provision, the Three Rivers' Ban, or the Four or More Axle Provision, because the language of those clauses is repugnant to the straightforward, limiting language of the respective statutory provisions. *Looney v. Commonwealth*, 145 Va. 825, 133 S.E. 753, 755 (Va. 1926) ("It is well settled that saving clauses which are inconsistent with the body of an act are rejected and disregarded as ineffective and void."); *see* also Sutherland on Statutory Construction, § 47:12 (same).

V.

We now turn to address the merits of the Plaintiffs' dormant Commerce Clause challenge to the statutory provisions at issue. The Commerce Clause provides that "the Congress shall have Power . . . to regulate Commerce . . . among the several States. . . . " Art. I, § 8, cl.3. Supreme Court precedent has long recognized that although phrased as a grant of regulatory power to Congress, the Commerce Clause inherently "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys. v. Department of Envtl. Quality*, 511 U.S 93, 98, 128 L. Ed. 2d 13, 114 S. Ct. 1345 (1994).

We apply the following two-tier approach in determining the constitutionality of a statutory provision challenged under the dormant Commerce Clause:

> The first tier, a virtually per se rule of invalidity, applies where a state law discriminates facially, in its practical effect, or in its purpose. In order

11/30/01 FRI 17:36 FAX 402 341 8712 COCKLE PRINTING 024

> for a law to survive such scrutiny, the state must prove that the discriminatory law is demonstrably justified by a valid factor unrelated to economic protectionism, and that there are no nondiscriminatory alternatives adequate to preserve the local interests at stake. . . .
>
> The second tier applies if a statute regulates evenhandedly and only indirectly affects interstate commerce. In that case, the law is valid unless the burdens on commerce are clearly excessive in relation to the putative local benefits.

Envtl. Tech. Council v. Sierra Club, 98 F.3d 774, 785 (4th Cir. 1996) (internal quotation marks and citations omitted); *see* also *Eastern Kentucky Resources v. Fiscal Court of Magoffin County*, 127 F.3d 532, 540 (6th Cir. 1997) ("A statute can discriminate against out-of-state interests in three different ways: (a) facially, (b) purposefully, or (c) in practical effect.")

A.

Here, the parties are in agreement that the statutory provisions at issue are not facially discriminatory against MSW generated outside Virginia. Thus, we must determine whether the statutory provisions at issue would discriminate against MSW generated outside Virginia in their practical effect or were enacted for the purpose of discriminating against MSW generated outside Virginia. Quite obviously, both inquiries present questions of fact. If the answer to either question is yes, we apply strict scrutiny analysis

11/30/01 FRI 17:36 FAX 402 341 8712 COCKLE PRINTING 025

B.

1.

The Plaintiffs offer the following evidence in support of their contention that the Cap Provision would discriminate against MSW generated outside Virginia in its practical effect. First, the Plaintiffs rely upon a November 1998 report issued by DEQ, reporting that, with respect to the MSW received by the seven large regional landfills in Virginia, approximately ninety-seven percent is MSW generated outside Virginia, while only two of the sixty-three small local landfills in Virginia accepted the remaining approximately three percent. Second, the Plaintiffs rely upon a sworn statement by Lee Wilson that he has personal knowledge that all seven of the large regional landfills in Virginia, except for the Gloucester County landfill, which operates under a local cap of 2,000 tons per day, have disposed of more than 2,000 tons per day of MSW in the past or can reasonably be expected to do so in the future. By contrast, he further stated, none of the approximately sixty-three landfills that receive principally Virginia-generated MSW receive any amount of MSW close to 2,000 tons per day of MSW. The Plaintiffs argue that from this evidence, a reasonable juror could only find that if the Cap Provision is allowed to take effect, it will impose a real and substantial burden on MSW generated outside Virginia while barely, if at all, impacting MSW generated in Virginia. Specifically, the burden is less access to permanent disposal.

In response, the Defendants argue that the Plaintiffs' evidence is legally insufficient because Lee Wilson did not identify a basis for his testimony and provided no

11/30/01 FRI 17:36 FAX 402 341 8712 COCKLE PRINTING 026

reason to believe that he had personal knowledge of this information. Furthermore, the Defendants argue that Lee Wilson's testimony is contradicted by their evidence that the Southeastern Public Authority Landfill (SPA Landfill), which accepts exclusively Virginia MSW, operates near the cap already and expects to reach that level soon. Moreover, the Defendants argue, the effect of the Cap Provision on the SPA Landfill is demonstrated by the fact that prior to the injunction against enforcement of the Cap Provision, the SPA Landfill applied for an increased tonnage allotment under the Cap Provision.

The Plaintiffs argue in response that Lee Wilson had ample basis for his testimony based upon his knowledge and experience in the MSW industry and based upon DEQ's November 1998 report. With regard to the SPA Landfill, the Plaintiffs note that on December 30, 1998, DEQ reported to Senator Bolling that the SPA Landfill received 1,540 tons of MSW per day and that when the SPA Landfill applied for an increase in tonnage allotment, it made clear that it expected to exceed the cap only on the "rare" occasions when its waste-to-energy plant is shut down for repairs (J.A. 1002).

After reviewing the evidence and arguments offered by both sides on this issue, we conclude that a genuine issue of material fact exists regarding whether the Cap Provision discriminates in its practical effect against MSW generated outside Virginia. Thus, the Plaintiffs are not entitled to summary judgment in their favor with respect to this issue.

11/30/01 FRI 17:36 FAX 402 341 8712 COCKLE PRINTING 027

2.

With respect to the Stacking Provision and the Three Rivers' Ban, the Defendants do not dispute that a far greater amount of MSW generated outside Virginia, as compared to MSW generated inside Virginia, is shipped in specialized containers on barges on Virginia's waterways for ultimate disposal in landfills located in Virginia. Likewise, the Defendants do not dispute that Hale and Waste Management had serious proposals, prior to the enactment of the statutory provisions at issue, whereby Hale would lease four barges for five years to Waste Management, which Waste Management in turn would use in transporting MSW generated in New York to Virginia on Virginia waterways for disposal in landfills located in Virginia. Finally, the Defendants do not dispute that enforcement of the Stacking Provision would more than double the cost of shipping MSW by barge on Virginia waterways.

Nevertheless, the Defendants argue that the Plaintiffs' evidence is insufficient to establish that the Stacking Provision and the Three Rivers' Ban discriminates in practical effect against MSW generated outside Virginia because the Plaintiffs failed to present any evidence establishing that there is not, never has been, and never would be any interest in barging MSW generated inside Virginia. The Defendants offer no citation of authority for this argument and we understand why. The obvious focus of the practical effect inquiry is upon the discernible practical effect that a challenged statutory provision has or would have upon interstate commerce as opposed to intrastate commerce. Logic dictates that for this purpose, the Plaintiffs are only required to show how the

11/30/01 FRI 17:37 FAX 402 341 6712 COCKLE PRINTING

Stacking Provision and the Three Rivers' Ban, if enforced, would negatively impact interstate commerce to a greater degree than intrastate commerce. This they have done, and the Defendants have not created a genuine issue of material fact on the issue.

3.

According to the Plaintiffs, the Trucking Certification Provision and the Four or More Axle Provision, if enforced, would have a discriminatory impact upon MSW generated outside Virginia because virtually all MSW generated outside Virginia is delivered to landfills in vehicles with four or more axles, while the majority of MSW generated inside Virginia is delivered to landfills in vehicles with less than four axles. We have reviewed both the evidence offered by the Plaintiffs in support of this assertion and the evidence offered by the Defendants in contest in the light most favorable to the Defendants. It suffices to say that the record reflects a genuine issue of material fact regarding whether the Trucking Certification Provision and the Four or More Axle Provision, if enforced, would discriminate against MSW generated outside Virginia in practical effect.

C.

We now ask whether, viewing the evidence in the record in the light most favorable to the Defendants, and drawing all reasonable inferences in their favor, reasonable jurors would find that Virginia's General Assembly enacted the statutory provisions at issue without a discriminatory purpose.

11/30/01 FRI 17:37 FAX 402 341 8712 COCKLE PRINTING 029

Several factors have been recognized as probative of whether a decisionmaking body was motivated by a discriminatory intent, including: (1) evidence of a "consistent pattern" of actions by the decisionmaking body disparately impacting members of a particular class of persons; (2) historical background of the decision, which may take into account any history of discrimination by the decisionmaking body or the jurisdiction it represents; (3) the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and (4) contemporary statements by decisionmakers on the record or in minutes of their meetings.

Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 819 (4th Cir. 1995)

We conclude the record in this case establishes that no reasonable juror could find that in enacting the statutory provisions at issue Virginia's General Assembly acted without a discriminatory purpose. Furthermore, the record in this case establishes that no reasonable juror could find that in signing the statutory provisions at issue into law Governor Gilmore acted without a discriminatory purpose.

Our conclusions rest upon the historical background of and sequence of events leading up to the General Assembly's enactment of and Governor Gilmore's signing into law the statutory provisions at issue. In 1998, the General Assembly and Governor Gilmore learned that, as of 1997, Virginia had become the nation's second largest

11/30/01 FRI 17:37 FAX 402 341 8712 COCKLE PRINTING 003

importer of MSW.[8] Next came the widely reported news that New York City was planning to close the Fresh Kills landfill and begin exporting more of its MSW. Then came reports that Waste Management was making a $20,000,000 investment in the James River facility. At this point, the wheels of a political movement to curb the flow of MSW generated outside Virginia from entering the borders of Virginia began to turn. The movement was co-spearheaded by Senator Bolling and Governor Gilmore.

On September 30, 1998, Senator Bolling issued a press release and formal statement pertaining to his intention to introduce "The Solid Waste Management Act of 1999" for consideration by Virginia's General Assembly during its 1999 legislative session. Senator Bolling's statement began by noting Virginia's then-current status as the second largest importer of MSW in the nation. He further noted that "most of the out of state waste currently coming to Virginia originates in New York, although significant amounts also come from the District of Columbia and the state of Maryland." (J.A. 601) Senator Bolling then listed a number of factors that he opined would increase pressure to import dramatically larger amounts of MSW generated outside Virginia. In this regard Senator Bolling cited an announcement by Waste Management that it had entered into a new contract with New York City to import 2,400 tons of MSW a day into Virginia; New York's intent to export 14,000 tons of MSW a day upon the closing of the Fresh Kills landfill, the vast

---

[8] Both the Congressional Research Service and the DEQ issued reports in 1998 announcing Virginia's number two MSW-importer ranking.

11/30/01 FRI 17:37 FAX 402 341 8712 COCKLE PRINTING 031

majority of which appeared to be heading to Virginia; and the plans of the then-nation's largest importer of MSW, Pennsylvania, to enact aggressive legislative measures to reduce the amount of MSW generated outside Pennsylvania from being imported into Pennsylvania.

Senator Bolling's statement then stated: "Some may ask why Virginians should be concerned about the large volume of out of state waste we are currently receiving? While there are a number of legitimate concerns, the following are some of the most important." (J.A. 601). Senator Bolling then proceeded to list the following four reasons: (1) continuing to allow Virginia's limited landfill space to be consumed by MSW generated outside Virginia may harm the ability of Virginia to properly dispose of its own waste in years to come; (2) because MSW generated outside Virginia is handled by a number of vendors before being transported to Virginia, Virginia's ability to have a satisfactory level of confidence about the nature of the waste it receives is limited; (3) the large amount of MSW generated outside Virginia that Virginia is currently receiving "has the potential of harming Virginia's legacy and image"; and (4) the potential for negative environmental impact on Virginia's land by the "massive landfill operations." (J.A. 602). Senator Bolling then stated that it was his belief that:

> . . . Virginia must act now to adopt a comprehensive solid waste management policy for the 21st century. Such a policy must assure that Virginia's solid waste disposal needs are addressed first, that the potential adverse environmental impacts associated with massive landfill operations are controlled, and that the important legacy of Virginia is preserved.

11/30/01 FRI 17:36 FAX 402 341 8712 COCKLE PRINTING 032

(J.A. 602). "Toward this end," Senator Bolling then stated, "I today announce my intention to introduce The Solid Waste Management Act of 1999 for consideration during the 1999 legislative session." *Id.* In the press release accompanying his formal statement, Senator Bolling echoed the protectionist motivation behind his introduction of The Solid Waste Management Act of 1999:

> "There is tremendous excess capacity in Virginia's landfills today. If we don't act now to cap the total amount of waste that can be disposed of in Virginia's landfills, the amount of waste being brought to Virginia from other states will increase significantly in the next few years. Such caps are the only effective way of limiting the amount of waste that is being imported to Virginia, and preserving our current landfill capacity for future generations of Virginians."

(J.A. 607) (emphasis added).

Three months later, on January 15, 1999, Governor Gilmore issued a press release containing the text of a letter he sent to New York City Mayor Rudolph Giuliani the same day. The letter reads:

> Dear Mayor Giuliani:
>
> I am greatly concerned by your recent comments regarding the transport of New York City's municipal waste to Virginia and the policy you announced in December to increase exports of waste to neighboring states. Like millions of people living from Maine to Florida, I am offended by your suggestion that New York's substantial cultural achievements, such as they are, obligates Virginia and other states to accept your garbage. Let me assure you that the

11/30/01 FRI 17:36 FAX 402 341 6712 COCKLE PRINTING 033

home state of Washington, Jefferson, and Madison has no intention of becoming New York's dumping grounds.

Over the past two weeks, one company in Virginia has tripled its shipments of New York's municipal waste to Virginia landfills to approximately 3,000 tons a day. The company also reports that it expects shipments to increase to roughly 2.2 million tons per year by 2002. Already, Virginia ranks as the second largest importer of municipal solid waste, behind only Pennsylvania. This is highly unacceptable.

I understand the problem New York City faces. It is one that most cities in the nation share. As an urban area, you do not have landfill facilities within your locality. However, I cannot agree with your conclusion that the only solution is to send your waste to Virginia. The Northeast is large and has many rural areas. I would hope that you could find a solution to your problem within your region. Unlike most rivers, your garbage can flow north as well as south.

I agree with you that New York is a great city with some of the finest cultural amenities in the world. But Virginia is a great state, deep with history, culture and tradition. I have a duty to ensure the protection of the natural and historic resources of Virginia and a solution to this growing trash problem is essential to my fulfilling that duty.

Very truly yours,

James S. Gilmore, III

Governor of Virginia

(J.A. 633-34) (emphasis added).

11/30/01 FRI 17:38 FAX 402 341 8712 COCKLE PRINTING 034

Just a week after the Governor issued his press release, the Governor announced in another press release that he was proposing, and that Senator Bolling would be the chief patron of, legislation intended to prevent Virginia from becoming the nation's dumping ground. Specifically, the Governor stated:

> The home state of Washington, Jefferson, and Madison has no intention of becoming the nation's dumping grounds. . . . That is why I've asked Senator Bolling to sponsor these bills that will increase state regulations on landfills, cap daily landfill deposits, and ban trash barges on Virginia's waterways.
>
> (J.A. 635) (emphasis added).

On January 26, 1999, Senator Bolling promptly followed with a memorandum to the members of the Solid Waste Subcommittee of the Senate Committee on Agriculture, Conservation and Natural Resources, stating:

> One of the most important issues that will be discussed during this years's session of the General Assembly is the debate surrounding Virginia's solid waste management practices. While many in the Genearal Assembly have been concerned about this issue for some time, the issue has taken on "front page prominence" in the last few weeks, primarily due to the emphasis that has been placed on out of state waste imports. I am writing to provide you with some background information on this issue.
>
> Earlier this year, the Department of Environmental Quality published their first written report quantifying the amount of waste that was being placed in Virginia's landfills. Surprisingly,

11/30/01 FRI 17:38 FAX 402 341 9712 COCKLE PRINTING 035

this report indicated that Virginia was receiving 3.2 million tons of garbage from other states, primarily New York. New York accounted for approximately 60% of our total waste imports, and imports accounted for approximately 30% of our total landfill deposits. Based on these findings, Virginia was identified as the second largest importer of waste in the nation.

Unfortunately, the amount of garbage being imported to Virginia has grown dramatically in the past year. That is primarily due to the impending closure of the Fresh Kills landfill in New York City, and the fact that Waste Management, Inc., who owns most of the large regional landfills in Virginia, has received the contract to handle the relocation of the Fresh Kills waste stream.

* * *

These large and increasing waste deposits are prematurely exhausting Virginia's limited landfill capacity. In fact, the Department of Environmental Quality has estimated that our current landfill capacity could be exhausted 20 years sooner than would otherwise be the case. This means that we may have to site an entire generation of new landfills in Virginia 20 years sooner than we would otherwise have to do so simply because our current landfill space is being filled up by waste from other states.

* * *

These waste deposits could create long term environmental problems for Virginia. . . . While we have no choice but to assume this burden for our own waste, we should feel no obligation to assume that burden for the waste of other states.

11/30/01 FRI 17:39 FAX 402 341 8712 COCKLE PRINTING 036

> Finally, I would suggest that becoming the nation's "King of Trash" is not consistent with the image we have tried to promote for Virginia. . . . How can we possibly promote Virginia as the Silicon Dominion of the 21st century while we stand idly by and allow Virginia to become the largest importer of garbage in the nation.
>
> (J.A. 637-38).

A few days after Senator Bolling issued the above quoted memorandum, in response to a request by another senator, he issued another memorandum to the Senate's Solid Waste Subcommittee containing additional information regarding the importation of MSW generated outside Virginia into Virginia's regional landfills. In this memorandum, Senator Bolling clearly outlined the potential for discriminatory impact upon MSW generated outside Virginia: "The vast majority of the municipal solid waste being received at the seven regional landfills in Virginia comes from other states. While the percentage of out of state waste statewide is approximately 30%, the percentage of out of state waste at the seven regional landfills is 71%." (J.A. 667). On the same day, Senator Bolling personally addressed the Solid Waste Subcommittee and verbally reassured committee members that most local landfills in Virginia accept less than one hundred tons of MSW a day, and thus would not be affected by a 2,000 ton per day cap. The record also contains transcripts of speeches on the floor of the General Assembly by two delegates to the General Assembly and the general reaction of fellow delegates. The transcripts establish the General Assembly's general antipathy toward MSW generated outside Virginia. First, one delegate to the General

11/30/01 FRI 17:39 FAX 402 341 8712 COCKLE PRINTING 037

Assembly queried: " 'Do we want to be known as the capital of garbage?' " (J.A. 1007). His query was met with a chorus of nos. He then queried: " 'Maybe we need a new bumper sticker - instead of Virginia is for lovers, what about Virginia is for garbage? Or how about a special license plate with a dumpster on it.' " *Id.* Again, the record shows a chorus of nos. Finally, Delegate Williams lamented before the General Assembly: " 'What a message we are sending, buy a home, live in the great Commonwealth, the number one importer of garbage.' " *Id.* Another delegate to the General Assembly explained:

> 'This [cap provision] is the second bill in the Governor's package that deals with the waste problem that we are having and I consider it the most important bill in the governor's package. . . This bill is the one that really gets at the doubling of waste the last two or three years at our landfills and the potential to double that waste again in the next two or three years."

Id. (alteration in original).

The evidence just outlined shows unmistakably the legislative and gubernatorial opposition to further increases in the volume of MSW generated outside Virginia crossing the borders of Virginia for ultimate placement in Virginia's seven regional landfills.[9] No

---

[9] Although the Defendants do not directly dispute the accuracy or authenticity of the press releases and transcripts just discussed and in some cases quoted, the Defendants argue the quotation's from the press releases and the debate transcripts are inadmissible because they "were not authenticated and were replete with double-hearsay." (the Defendants' Br. at 44) Because the Defendants failed to make

11/30/01 FRI 17:39 FAX 402 341 8712 COCKLE PRINTING 038

reasonable juror could find the statutory provisions at issue had a purpose other than to reduce the flow of MSW generated outside Virginia into Virginia for disposal. Indeed, the very purpose the Defendants proffer in this litigation for the enactment of the statutory provisions at issue – to alleviate or at least reduce health and safety threats to Virginia's citizens and environment created by the importation of MSW from states with less strict limitations upon the content of MSW than Virginia – fully supports our conclusion. This is because an inherent component of the Defendants' proffered purpose of Virginia's enactment of the statutory provisions at issue is discrimination against MSW generated outside Virginia. Whether Virginia has a constitutionally valid reason for engaging in such discrimination is the focus of the strict scrutiny inquiry.

The Defendants contend the record shows that a genuine issue of material fact exists with respect to

---

these objections below, and a gross miscarriage of justice has not resulted from the district court's consideration of the challenged evidence in support of the Plaintiffs' motion for summary judgment, the Defendants waived their right on appeal to challenge the admissibility of this evidence. *See Jones v Owens-Corning Fiberglas Corp.*, 69 F.3d 712, 718 (4th Cir. 1995); *Liberles v. Cook County*, 709 F.2d 1122, 1126 (7th Cir. 1983); *Auto Drive-Away Co. of Hialeah, Inc v Interstate Commerce Commission*, 360 F.2d 446, 448-49 (5th Cir. 1966); 10A A. Charles Alan Wright et al., Federal Practice & Procedure § 2716, 282-286 (3d ed. 1998). Accordingly, the Defendants on appeal cannot rely on these arguments of inadmissibility as a basis for reversal of the district court's grant of summary judgment in favor of the Plaintiffs.

11/30/01 FRI 17:39 FAX 102 341 8712 COCKLE PRINTING 039

whether the statutes at issue were enacted with discriminatory intent or for neutral reasons. In support, the Defendants direct our attention to a post-enactment statement in a sworn declaration by Senator Bolling to the effect that he sponsored the statutory provisions at issue because of his concern over the rapid growth in the volume of MSW being deposited in Virginia landfills "regardless of the source" of that MSW. (J.A. 1228).

This statement is not sufficient to create a genuine issue of material fact on the issue of intent, because other statements by Senator Bolling in the same sworn declaration flatly contradict his "regardless of the source" phrase. Specifically, Senator Bolling admitted that MSW generated outside Virginia presented "increased concerns" on account of "the rapidly increasing volume and our perception that we in the Commonwealth have less control over the content of that waste and our ability to enforce Virginia regulations as to that waste stream." (J.A. 1229). In enacting the statutory provisions at issue, Senator Bolling further explained: "We were aware that the solid waste regulations of other states were not as stringent as those of the Commonwealth." *Id.* These latter quoted statements of Senator Bolling unequivocally show that the volume of MSW generated outside Virginia flowing into Virginia triggered more concern on the part of Virginia's General Assembly than the volume of MSW generated in Virginia being deposited in landfills located in Virginia. It is true that other portions of Senator Bollings' sworn declaration stress that Virginia intended the challenged statutes to regulate evenhandedly without regard to the source of the waste; however, the Defendants cannot create a genuine issue of material fact by

11/30/01 FRI 17:10 FAX 402 341 8712 COCKLE PRINTING 010

presenting conflicting sworn statements as they have done with respect to the issue of discriminatory intent. *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984) ("A genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the plaintiff's testimony is correct.").

D.

We must next consider whether, viewing the evidence in the light most favorable to the Defendants, the Defendants have proffered sufficient evidence for reasonable jurors to find, with respect to each statutory provision at issue, that the provision is demonstrably justified by a valid factor unrelated to economic protectionism, and that no nondiscriminatory alternatives exist that are adequate to preserve the local interests at stake. *Environmental Technology Council*, 98 F.3d at 785.

1.

The Defendants argue that all of the statutory provisions at issue are demonstrably justified because "solid waste streams generated in trash exporting states raise health and safety concerns not presented by Virginia waste." (the Defendants' Br. at 56). In this regard, the Defendants stress that the problem is particularly acute with respect to exporting states that do not have laws as strict as Virginia's laws governing regulated medical waste and certain types of hazardous waste. By analogy, the Defendants rely upon *Maine v Taylor*, 477 U.S. 131, 91 L. Ed. 2d 110, 106 S. Ct. 2440 (1986). In that case, Maine

11/30/01 FRI 17:10 FAX 402 341 8712 COCKLE PRINTING 011

demonstrated that all out-of-state baitfish were subject to parasites foreign to in-state baitfish. This difference posed a threat to Maine's natural resources, and absent a less discriminatory means of protecting the environment – and none was available - the importation of baitfish from any state could properly be banned. *Id.* at 140.

The Plaintiffs do not quarrel with the Defendants' position that the health and safety of Virginia citizens is a legitimate local interest. Neither do we. Nevertheless, in order to survive the Plaintiffs' motion for summary judgment with respect to the first prong of strict scrutiny analysis, the Defendants must carry their burden of showing that MSW generated outside Virginia is more dangerous than MSW generated in Virginia. *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 343-44, 119 L. Ed. 2d 121, 112 S. Ct. 2009 (1992) (recognizing that while the health and safety of the citizens of Alabama may be a legitimate local interest, Alabama offered no evidence that hazardous waste generated outside Alabama is more dangerous than hazardous waste generated in Alabama. therefore, Alabama failed to carry its burden of showing that the Alabama statute imposing an additional fee on all hazardous waste generated outside Alabama and disposed of at Alabama facilities was demonstrably justified by a valid factor unrelated to economic protectionism).

In this regard, the Defendants have offered evidence demonstrating, when viewed in the light most favorable to them: (1) that certain materials in MSW can be hazardous to human health; (2) that each state has its own definition of MSW; (3) that "while one state may find it appropriate to regulate strictly a certain type of solid

11/30/01 FRI 17:10 FAX 402 341 8712 COCKLE PRINTING 012

waste, another state may not be as aware of or concerned about the risks posed by that type of item into the MSW stream." (J.A. 356); (4) that Virginia law completely prohibits potentially infectious items such as blood and urine from being disposed of as MSW, while Maryland and North Carolina allow disposal of blood and urine as MSW under limited circumstances; (5) that Virginia law prohibits urine from being disposed of as MSW while New York allows its disposal as MSW without limitation; (6) that Maryland and New York allow hazardous waste generated at less than 100 kilograms per month to be disposed of as MSW while Virginia does not; and (7) that unlike Virginia, Maryland and New York do not impose manifesting or tracking requirements on hazardous waste from small quantity generators.

From this evidence, a reasonable juror could infer that, as a whole, MSW generated outside Virginia poses health and safety risks not posed by MSW generated inside Virginia. Such a finding would satisfy the Defendants' burden of establishing that the statutory provisions at issue are justified by a reason other than economic protectionism.

2.

With respect to the second prong of the strict scrutiny test, the Defendants must prove that the statutory provisions at issue are the least discriminatory means of addressing Virginia's concern that MSW generated outside Virginia poses health and safety risks not posed by MSW generated inside Virginia.

11/30/01 FRI 17:11 FAX 402 341 8712 COCKLE PRINTING 043

a.

The Defendants assert that any plan for improving state police powers over MSW must begin with and be linked to limiting the volume of MSW to a level where waste can be screened adequately. In support of this assertion, the Defendants rely on the following sworn statements by Virginia's Director of Program Coordination for DEQ:

> The cap statute is a necessary and appropriate response to the MSW volume crisis faced by the Commonwealth. The problem is particularly acute with regard to out-of-state MSW. While out-of-state MSW poses more of a threat than Virginia MSW, the Commonwealth has less ability to police the out-of-state loads. Any plan for improving state police powers over MSW must begin with and be linked to controlling the volume to a level where waste can be adequately screened.
>
> The disposal cap statute allows the Commonwealth to better protect health and safety within the Commonwealth by controlling daily levels of MSW to a volume that reasonably can be managed and policed.
>
> • • •

Increased DEQ inspections are a valuable mechanism for increasing adherence to regulations. However, the volume problem cannot be controlled simply by stepping up the inspection rate at landfills. The number of inspectors is simply one component of an effective waste-screening program by the Commonwealth. Matching the number of inspectors to the increasing volumes becomes counterproductive at a point where the traffic of large

11/30/01 FRI 17:41 FAX 402 341 8712 COCKLE PRINTING 004

container trucks arriving at the landfill face, depositing their loads, and departing renders the landfill face unsafe for foot traffic. Without a doubt, high volumes of waste make inspecting waste even more difficult and exacerbate an ongoing problem.

The time required for the DEQ inspectors to adequately screen the waste will limit the volume of waste that can be processed at a landfill on a daily basis. An effective screening program by the Commonwealth would require the unloading of vehicles on an impermeable pad or other area dedicated to waste screening. The waste would then have to be spread to a sufficient shallow depth on the pad to identify individual components, including the breaking apart of waste received in a baled, compacted, or frozen state. Intense visual screening would then be conducted by the inspector. Besides visual screening, chemical analysis through hazardous waste screening devices would have to be undertaken in order to detect hazardous waste which cannot be detected visually. Further, the testing protocol for certain waste may involve laboratory analysis that cannot be completed in short duration. If unauthorized waste is discovered, processes must be in place for the removal and proper disposition of waste at an appropriate waste facility. The Commonwealth will have to develop a specific program depending on the needs and character of each different facility. Once a program is developed, it will have to be refined until it is proven effective. This process would slow operations down to a halt and have the practical effect of lowering daily intake to far lower than 2,000 tons a day.

11/30/01 FRI 17:11 FAX 102 341 8712 COCKLE PRINTING 015

A properly designed certification requirement would not be as effective as the disposal cap statute because, without volume control, DEQ cannot adequately police MSW loads.

(J.A. 1159 61).

In response, the Plaintiffs primarily argue that the Defendants have failed to meet the second prong because the Cap Provision does not use the least discriminatory means of addressing the alleged health and safety concern about the composition of MSW generated outside Virginia. The Plaintiffs point out that the Cap Provision makes no effort to distinguish between the MSW of states according to an individual state's level of MSW regulation. According to the Plaintiffs, interstate commerce would be burdened less if Virginia only capped the amount of waste that can be imported from states with MSW regulatory schemes less restrictive than Virginia. Additionally, the more closely a state's MSW regulatory scheme tracks that of Virginia, the higher the cap should be.

At first blush, the Plaintiffs' argument seems more discriminatory against MSW generated outside Virginia than the across the board cap in the Cap Provision. However, when one carefully considers the Plaintiffs' argument, its logic is clear. If a state enacts a statute that purposely discriminates against interstate commerce in an effort to address a concern other than economic or resource protectionism, the second prong of the strict scrutiny test requires that the statute impose the least burden possible on interstate commerce. In other words, rather than discriminating against MSW from every state

11/30/01 FRI 17:41 FAX 402 341 8712 COCKLE PRINTING

other than Virginia, Virginia's cap should only target the MSW from states that have lesser health and safety standards regarding MSW than Virginia. Because the Defendants have presented no evidence as to why a narrower capping statute would not adequately address the identified health and safety concerns for Virginia citizens, the Defendants fail to survive the Plaintiffs' motion for summary judgment with respect to the second prong of the strict scrutiny test as it pertains to the Cap Provision.[10]

b.

The Defendants argue that they have submitted sufficient evidence to create a genuine issue of material fact regarding whether the Stacking Provision and the Three

---

[10] The situation at issue here is materially distinguishable from the situation in *Maine v. Taylor*, 477 U.S. 131, 91 L. Ed. 2d 110, 106 S. Ct. 2440 (1986), legal authority heavily relied upon by the Defendants. In *Taylor*, sampling and inspection procedures did not already exist for testing whether baitfish imported from outside Maine contained parasites harmful to native fisheries. Here, sampling and inspection procedures already exist for testing whether MSW generated outside Virginia contains materials harmful to the health and safety of Virginia citizens. The Defendants' proffered nondiscriminatory reason for the Cap Provision is that some states have less strict regulations regarding the content of MSW than Virginia. The Defendants have offered evidence that the inspection procedures regarding MSW are inadequate to protect the health and safety of Virginia citizens with respect to MSW generated from states outside Virginia with MSW regulatory schemes less strict than Virginia. However, the Defendants have offered no evidence as to why the MSW generated from states with MSW regulatory schemes that are equally or more strict than Virginia should be capped.

Rivers' Ban are the least discriminatory alternatives available for protecting the health and safety of Virginia citizens against the toxic contamination of its rivers from unintended spills. We agree. Notwithstanding the Plaintiffs' protestations to the contrary, the Defendants have submitted sufficient evidence in this regard to create genuine issues of material fact that need to be resolved by the trier of fact. For example, the Defendants have submitted the sworn statement of DEQ Director Dennis Treacy that based upon his knowledge and experience, the Stacking Provision and Three Rivers' Ban are necessary to protect the health and safety of Virginia citizens. Treacy outlines in a sworn declaration why and how barge transport of MSW presents serious and unique health and safety threats to Virginia's citizens that cannot be alleviated absent enforcement of the Stacking Provision and the Three Rivers' Ban. Furthermore, the record contains Hale's answers to interrogatories in which Hale admits: (1) in 1993, it lost thirty-three containers containing general merchandise overboard on a barge it owned due to improper lashing; and (2) in 1994, a fire resulted in the partial destruction of cargo on board a barge it owned. These incidents certainly suggest the potential for a health and environmental disaster on a Virginia waterway presented by the barge transport of MSW.

c.

As for the Trucking Certification Provision and the Four or More Axle Provision, the Defendants fail to offer any affirmative evidence of the non-existence of less burdensome alternatives on interstate commerce. Instead, the Defendants rely on the deference that is traditionally

11/30/01 FRI 17:12 FAX 402 341 8712 COCKLE PRINTING 048

given state legislation in the area of highway safety. The traditional deference that is due state legislation in the area of highway safety derives in part from the assumption that where such regulations do not discriminate on their face against interstate commerce, their burden usually falls on local economic interests as well as other States' economic interest, thus insuring that a State's own political processes will serve as a check against unduly burdensome regulations. Less deference to the legislative judgment is due . . . where the local regulation bears disproportionately on out-of-state residents and businesses

Kassel v Consolidated Freightways Corp., 450 U.S. 662, 675-76, 67 L. Ed. 2d 580, 101 S. Ct. 1309 (1981) (internal quotation marks omitted).

While all the parties agree that the Trucking Certification Provision and the Four or More Axle Provision are not facially discriminatory against MSW generated outside Virginia, and we have already determined that a genuine issue of material fact exists regarding whether these statutory provisions discriminate in their practical effect against MSW generated outside Virginia, the Defendants' argument that we are required to give deference to the legislative judgment of the General Assembly in applying the second prong of the strict scrutiny analysis (to the Trucking Certification Provision and the Four or More Axle Provision) is without merit. This is because we have also determined that no reasonable juror could find that in enacting these two statutory provisions Virginia's General Assembly acted without a discriminatory purpose. Such a discriminatory purpose wholly undercuts the notion that Virginia's political process served as

12/30/01 FRI 17:42 FAX 402 341 8712 COCRLE PRINTING 049

a check against unduly burdensome regulations. Without such a check, the rationale for owing deference to the legislative judgment of Virginia's General Assembly in the area of highway safety is completely lacking.

With no deference owed to the legislative judgment of Virginia's General Assembly in enacting the Trucking Certification Provision and the Four or More Axle Provision, and with absolutely no evidence showing that less burdensome alternatives do not exist on interstate commerce, these two statutory provisions do not survive the second prong of the strict scrutiny test. Accordingly, we affirm the district court's grant of summary judgment in favor of the Plaintiffs with respect to their dormant Commerce Clause challenge in regard to the Trucking Certification Provision and the Four or More Axle Provision.

E.

The Defendants next seek to avoid confrontation with the strictures of the dormant Commerce Clause altogether by asserting application of the market participant doctrine. Under the market participant doctrine, "a state acting in its proprietary capacity as a purchaser or seller may favor its own citizens over others." *Camps Newfound/ Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 592-93, 137 L. Ed. 2d 852, 117 S. Ct. 1590 (1997) (internal quotation marks omitted). If there is no "direct state involvement in the market," however, the strictures of the dormant Commerce Clause apply with full force. *Id.* at 593.

The record in this case, when viewed in the light most favorable to the Defendants, leaves no doubt, as the

11/30/01 FRI 17:43 FAX 402 341 8712 COCKLE PRINTING 050

district court astutely observed, that in enacting the statutory provisions at issue, Virginia was not acting as a private participant in the waste disposal market, but as regulator of "the conduct of others in that market as only a state can do." *Waste Management II*, 64 F. Supp. 2d at 544. Accordingly, the market participant doctrine is inapplicable.

F.

The Defendants next argue that in enacting Subchapter IV of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6941-6949a, Congress intended to authorize a state to discriminate against MSW generated outside that state, thus overriding the dormant Commerce Clause. We disagree.

The dormant Commerce Clause prohibits states from unjustifiably discriminating against the free flow of interstate commerce. *Environmental Tech. Council*, 98 F.3d at 782.

Where Congress has acted in an area specifically authorizing state or local government action, the dormant Commerce Clause is, however, inapplicable, even if the state action interferes with interstate commerce. . . .

In order for a state law to be removed from the reach of the dormant Commerce Clause, however, congressional intent to authorize the discriminating law must be either unmistakably clear or expressly stated. Congress need not state that it intends to override the dormant Commerce Clause, but it must affirmatively have contemplated the otherwise invalid state legislation.

11/30/01 FRI 17:43 FAX 102 341 8712 COCKLE PRINTING 051

Id. (internal quotation marks omitted). Here, the Defendants bear the burden of establishing congressional intent to authorize a state to discriminate against MSW generated outside that state. *Wyoming v. Oklahoma*, 502 U.S. 437, 458, 117 L. Ed. 2d 1, 112 S. Ct. 789 (1992).

Subchapter IV of RCRA governs "State or Regional Solid Waste Plans." Its objectives "are to assist in developing and encouraging methods for the disposal of solid waste which are environmentally sound and which maximize the utilization of valuable resources including energy and materials which are recoverable from solid waste and to encourage resource conservation." 42 U.S.C. § 6941. These objectives are to be accomplished by federal "assistance to States or regional authorities for comprehensive planning pursuant to Federal guidelines. . . ." *Id.*

In support of their congressional override argument, the Defendants point to a provision of Subchapter IV in which Congress directed that states be encouraged to consider numerous local conditions in addressing their solid waste disposal problems, including: "population density, distribution, and projected growth"; local "geographic, geologic, climatic, and hydrologic characteristics"; and "political, economic, organizational, financial, and management problems affecting comprehensive solid waste management." 42 U.S.C. § 6942(c). According to the Defendants, by encouraging states to account for these factors in creating MSW plans, Congress "explicitly gave states the authority to protect local interests when it comes to MSW management, including the authority to limit or exclude MSW from other states." (the Defendants' Br. at 37).

11/30/01 FRI 17:43 FAX 402 341 9712 COCKLE PRINTING 052

The Defendants also contend that the legislative history of RCRA makes unmistakably clear that Congress intended to override the dormant Commerce Clause so as to constitutionally permit a state to refuse disposal of MSW generated outside that state. The snippets of legislative history upon which the Defendants rely in making this argument are as follows: (1) "in formulating a state plan it is the Committee's intention to permit wide flexibility on the part of the state developing such plan so that each state can plan for its particular problems," H.R. Rep. No. 94-1491, pt. 1 at 35 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6273; (2) Subchapter IV does not "prevent or effect [sic] any activities that [were] presently being carried out" by states at the time Subchapter IV was enacted,[11] *id.* at 64, 6302; and (3) a statement that "it is the purpose of this legislation to assist the cities, counties and states in the solution of the discarded materials problem," *id.* at 11, 6249.

Below, the district court concluded that these isolated bits of legislative history and the broadly worded statutory language upon which they rely "do not come close to expressing an 'unmistakably clear' intent on the part of Congress to exempt state laws relating to solid waste from the limitations of the dormant Commerce Clause."

---

[11] The Defendants claim this second snippet of legislative history is relevant because at the time Congress enacted Subchapter IV it acknowledged that "some states have moved to ban the importation of waste as have their political subdivisions. These actions have raised serious questions relative to restraint of trade and interference with interstate commerce." H.R. Rep. No. 94-1491, pt. 1 at 3 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6240.

11/30/01 FRI 17:43 FAX 402 341 8712 COCKLE PRINTING 083

(J.A. 10). We fully agree with this conclusion. The fragments of statutory language and legislative history cited by the Defendants fall far short of the demanding standard that congressional intent be unmistakably clear. *See In re: Southeast Arkansas Landfill, Inc.*, 981 F.2d 372, 377 (8th Cir. 1992) (holding that "nothing in RCRA or any other federal statute comes close to authorizing different treatment of out-of-state waste").

G.

The Defendants' next to last attempt at avoiding the strictures of the dormant Commerce Clause altogether is their assertion of a purported affirmative defense. In this regard, the Defendants challenge the district court's grant of the Plaintiffs' motion to strike their affirmative defense.

Federal Rule of Civil Procedure 12(f) permits a district court, on motion of a party, to "order stricken from any pleading any insufficient defense." Rule 12(f) motions are generally viewed with disfavor "because striking a portion of a pleading is a drastic remedy and because it is often sought by the movant simply as a dilatory tactic." 5A A. Charles Alan Wright et al., Federal Practice & Procedure § 1380, 647 (2d ed. 1990). Nevertheless, "a defense that might confuse the issues in the case and would not, under the facts alleged, constitute a valid defense to the action can and should be deleted." *Id.* § 1381 at 665.

The Defendants purported affirmative defense is based upon their assertion that New York City interfered with the free flow of commerce, and by extension the

11/30/01 FRI 17:44 FAX 402 341 8712 COCKLE PRINTING 054

Commerce Clause, by taking affirmative steps to discourage the disposal of MSW within the borders of the State of New York. Having so interfered, the Defendants contend the Plaintiffs are prohibited from challenging the statutory provisions at issue under the dormant Commerce Clause. Not surprisingly, the Defendants cite no case law in support of their position.

We hold the district court did not err in striking the Defendants' purported affirmative defense. Even assuming arguendo that New York's alleged conduct should legally prevent it from bringing a constitutional challenge under the dormant Commerce Clause to the statutory provisions at issue, at the risk of stating the obvious, neither the State of New York nor New York City is a plaintiff in this litigation. Furthermore, we see no basis for somehow holding any of the Plaintiffs vicariously liable for the conduct of the State of New York and/or New York City.

VI.

Lastly, the Defendants challenge the district court's holding that the Three Rivers' Ban and the Stacking Provision violate the Supremacy Clause. The Supremacy Clause provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl.2.

11/30/01 FRI 17:44 FAX 402 341 8712 COCKLE PRINTING 088

> Thus, federal legislation, if enacted pursuant to Congress' constitutionally delegated authority, can nullify conflicting state or local actions. Consideration of issues arising under the Supremacy Clause starts with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress. The ultimate touchstone of preemption analysis is the intent of Congress. Even when Congress' intent is unclear, state law must nevertheless yield when it conflicts with federal law. In making the determination of whether state law conflicts with federal law, the test to apply is whether it is impossible to comply with both state and federal law or whether the state law stands as an obstacle to the accomplishment of the full purposes and objectives of the relevant federal law.
>
> *National Home Equity Mortg. Assoc. v. Face*, 239 F.3d 633, 2001 WL 101454 at *2 (4th Cir. 2001) (internal quotation marks and citations omitted) (alteration in original).

The Supremacy Clause claim at issue in this appeal principally relies on the federal documentation provisions governing the use of vessels in the coastwise trade. *See* 46 U.S.C. § 12103 (describing prerequisites for issuance of a "certificate of documentation") and § 12106 (describing criteria for endorsing a certificate of documentation with a "coastwise endorsement"). According to the record, each barge that Hale plans to supply Waste Management for the transportation of MSW has a valid federal Certificate of Documentation authorizing it to engage in "coastwise trade" and a valid Coast Guard Certificate of Inspection.

The Supreme Court has held that a federal license confers upon the licensee a right to operate freely in each state's waters, subject only to legitimate exercises of the state's police power. *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 281, 52 L. Ed. 2d 304, 97 S. Ct. 1740 (1977). Thus, "states may impose upon federal licensees reasonable, nondiscriminatory conservation and environmental protection measures otherwise within their police power." *Id.* at 277. Precedent is clear, however, that a state statute that completely excludes federally licensed commerce upon such state's waterways is unconstitutional. *Id.* 283.

Here, the Three Rivers' Ban completely excludes federally licensed barges from transporting any type or amount of MSW on the Rappahanock, James and York Rivers in Virginia. The reasonableness of such a complete ban is simply not supported by the evidence in the record, even when viewed in the light most favorable to the Defendants. The issue of whether federal preemption of the Stacking Provision exists is far less clear. Indeed, genuine issues of material fact exist regarding the health and environmental risks associated with stacking sealed shipping containers containing MSW more than two high on barges. Accordingly, the district court erred in concluding as a matter of law that the Stacking Provision violates the Supremacy Clause.[12]

---

[12] The Defendants contend that the "savings" language contained in the Three Rivers' Ban and the Stacking Provision save those statutes from a Supremacy Clause challenge. We reject this argument on the basis that the restrictions at issue are straightforward and their accompanying savings language is repugnant to those restrictions. *See Looney*, 133 S.E. at 755.

We also reject the Defendants' argument that 42 U.S.C. § 1983 does not provide Hale a remedy with respect to its

VII.

In conclusion, we affirm the district court's grant of summary judgment in favor of the Plaintiffs with respect to their dormant Commerce Clause challenges to the Cap Provision, the Trucking Certification Provision, and the Four or More Axle Provision. We also affirm the district court's grant of summary judgment in favor of the Plaintiffs with respect to Hale's Supremacy Clause challenge to the Three Rivers' Ban. However, we vacate the district court's grant of summary judgment in favor of the Plaintiffs with respect to their dormant Commerce Clause challenge to the Three Rivers' Ban and the Stacking Provision and remand for further proceedings consistent with this opinion. We also vacate the district court's grant of summary judgment in favor of Hale with respect to Hale's claim that the Stacking Provision violates the Supremacy Clause and remand for further proceedings consistent with this opinion. Finally, we vacate the district court's

---

Supremacy Clause claim. By its terms, Title 42 U.S.C. § 1983 only provides a remedy for the violation of rights that are defined in the Constitution or in a federal statute. Thus, the § 1983 remedy will be available for a violation of a federal statute only if the statute itself "gives rise to a federal right." *Blessing v. Freestone*, 520 U.S. 329, 137 L. Ed. 2d 569, 117 S. Ct. 1353 (1997).

While "the Supremacy Clause, of its own force, does not create any rights enforceable under § 1983," *Golden State Transit v. Los Angeles*, 493 U.S. 103, 107, 107 L. Ed. 2d 420, 110 S. Ct. 444 (1989), the federal documentation provisions governing the use of vessels in the coastwise trade, *see* 46 U.S.C. §§ 12103, 12106, confer a right in the form of a license to operate freely in each state's waters subject only to the legitimate exercise of a state's police powers. *Douglas*, 431 U.S. at 281. As the holder of such licenses, Hale has standing to assert its Supremacy Clause claim under § 1983.

11/30/01 FRI 17:45 FAX 402 341 8712 COCKLE PRINTING 005

entry of judgment against Governor Gilmore and remand with instructions that the district court dismiss him as a party in this action.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

CONCUR BY: WIDENER; KING (In Part)

CONCUR: WIDENER, Circuit Judge, concurring:

I concur in all of the opinion of the court except Part IV.A, and I concur in the result that Part IV.A obtains.

I.

The pertinent part of the Code section involved is not complicated:

Any locality is authorized to contract with any person, whether profit or non-profit, for garbage and refuse pickup and disposal services in its locality and to enter into contracts relating to waste disposal facilities which recover energy or materials from garbage, trash and refuse

Virginia Code § 15.2-932 (Michie 1997).

As to Part IV.A and the statute involved here, it is obvious to me that a more reasonable reading of the plain language of the statute would confine the contracting authority to "its locality" in accord with the position taken by the defendants under the Dillon's rule construction required in Virginia when construing statutes conferring power upon political sub-divisions. That rule, as construed, is that "any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation and the power is denied," as

11/30/01 FRI 17:15 FAX 402 341 8712 COCKLE PRINTING 059

noted in the majority opinion, slip 16. *Richmond v. Bd. of Sup'rs of Henrico County*, 199 Va. 679, 101 S.E.2d 641, 645 (Va. 1958). But this Code section has been construed by the Virginia Supreme Court in *Concerned Residents v. Bd. of Sup'rs of Gloucester County*, 248 Va. 488, 449 S.E.2d 787 (Va. 1994) in the context of trash collection, as here: "action taken by the county in response thereto is a legislative act in the furtherance of the county's police powers." 449 S.E.2d at 790. "When a legislative body [so] exercises its police powers every possible presumption shall be indulged in favor of the validity of its legislative act." 449 S.E.2d at 790.

In the case at hand there is no doubt that the trash facility involved here undertook, with the agreement and consent of the county, the reception of trash from outside Virginia. This undertaking was just such an exercise of police power as the Virginia Court referred to in Concerned Residents. When that is taken into account, in my opinion, taking the out-of-state trash into the Virginia trash dump was not ultra vires under the Dillon rule. In this construction of the statute, I am supported by Virginia Code § 15.2-937(B), a part of the same statutory scheme as § 15.2-932, which refers to "solid waste transported from any jurisdiction," an obvious inference that the importation of foreign trash is contemplated by the statute.

The powers of political sub-divisions in Virginia are quite limited under Dillon's rule, as noted by the majority. In addition to powers granted in express words, or incident to and necessary, or fairly implied, by such words, they are limited to "those essential to the accomplishment of the declared objects and purposes of the corporation – not simply convenient but indispensable."

Board of Supervisors of Henrico Co., 101 S.E.2d at 645; *Cline v. Robb*, 548 F. Supp. 128, 131 n.7 (E.D. Va. 1982) (three-judge court). The Commonwealth can thus limit the power of political sub-divisions to contract with waste disposal facilities of any kind, but the Commonwealth may not authorize a political sub-division to contract with such waste disposal facilities in violation of the Constitution, as here.

There is no reason apparent why Virginia may not permit her political sub-divisions to operate waste disposal facilities for their own benefit, either performing the operation itself or by contract. Or Virginia may do the same. In that event, the Commonwealth or the political sub-division disposing of local waste would act under the market participant exception to the Dormant Commerce Clause. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 65 L. Ed. 2d 244, 100 S. Ct. 2271 (1980) (holding that a state-owned concrete plant could choose to sell only to state residents); *Nat'l Solid Waste Mgmt. Assn. v. Williams*, 146 F.3d 595 (8th Cir. 1998); cf. *Med. Waste Mgmt. Assoc. v. Mayor and City Council of Baltimore*, 966 F.2d 148 (4th Cir. 1992). But if the Commonwealth chooses to permit the political sub-divisions to use waste disposal as a revenue source by the importation of foreign waste, it must be done within the confines of the Constitution. Language authorizing political subdivisions to act as market participants might be easily drafted, but such has not been accomplished here.

II.

I do not rely on the rather flamboyant statements of the political authorities in arriving at my concurrence.

11/30/01 FRI 17:15 FAX 102 341 8712 COCKLE PRINTING 060

DISSENT BY: KING (In Part)

DISSENT: KING, Circuit Judge, concurring in part and dissenting in part:

I am pleased to concur in nearly all of the fine opinion authored by my friend Judge Hamilton. I part company with him solely on the issue concerning the propriety of this suit being maintained against Governor Gilmore, and I respectfully dissent on that point. In determining that the Governor is not a proper party to this action, the majority, in my view, erroneously concludes that "the fact that he has publicly endorsed and defended the challenged statutes does not alter our analysis." *Ante*, at 2001 U.S. App. LEXIS 11573, *26. The majority instead posits that our resolution of this question rests on whether his general duty to "take care that the laws be faithfully executed," Va. Const. art. V, § 7, makes him a proper defendant in this case under the exception to Eleventh Amendment immunity found in *Ex parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908). Because Governor Gilmore's connection to the statutes at issue is far more specific than his general duty to uphold the law, I would not dismiss him as a party.[1]

---

[1] Likewise, the district court, in retaining Governor Gilmore as a party, recognized that his connection to the disputed statutes extends beyond his general duty to uphold the law. The court noted that "many courts have held that a generalized duty to enforce state law is insufficient. Governor Gilmore, however, has actively and publicly defended the legislation at issue. He is therefore a proper defendant." *Waste Mgmt. Holdings, Inc. v. Gilmore*, 64 F. Supp. 2d 537, 543 n.6 (E.D. Va. 1999) (citations omitted).

11/30/01 FRI 17:45 FAX 402 341 8712 COCKLE PRINTING 061

The majority's own account of the facts in this case confirms to me that Governor Gilmore is not just a superfluous target of the Plaintiffs. Upon learning of New York City's imminent exportation of municipal solid waste ("MSW"), the Governor announced plans to "dispatch[ ] his top environmental officials to meet with their counterparts from other states 'to ensure that Virginia does not drown in a regional sea of garbage.' " *Ante* at 2001 U.S. App. LEXIS 11573, *14 (quoting J.A. 597). He also imposed a moratorium on new landfill development, and he instructed his Secretary of Natural Resources to recommend legislation to deal with the MSW problem. *See id.* at 9. The Governor himself proposed such legislation in his 1999 State of the Commonwealth address to the General Assembly of Virginia, referring specifically to Waste Management's plans " 'to import four thousand more tons of New York City trash into Virginia per day.' " *Id.* (quoting J.A. 630). Moreover, "when New York City Mayor Giuliani suggested that Virginia might have an obligation to accept New York City's MSW, Governor Gilmore responded that 'the home state of Washington, Jefferson, and Madison has no intention of becoming New York's dumping grounds.' " *Id.* (quoting J.A. 635) (alteration in original). In fact, in early 1999, the General Assembly approved and the Governor signed into law the five statutory provisions at issue in this case. *See id.* at 10.

Furthermore, Governor Gilmore's co-defendants – the Commonwealth's Secretary of Natural Resources and the Director of the Virginia Department of Environmental Quality – possess unquestioned authority to enforce these statutes. Significantly, though not explicitly discussed in the course of the district court proceedings, they serve

11/30/01 FRI 17:16 FAX 402 341 8712 COCKLE PRINTING 006

under the direction and control of the Governor. *See* Va. Code Ann. § 2.1-51.7 (1995) ("The Secretary [of Natural Resources] shall hold office at the pleasure of the Governor. . . . "); *id.* § 2.1-51.8:1 ("The Secretary of Natural Resources shall be subject to direction and supervision by the Governor."); Va. Code Ann. § 10.1-1185 (1998) ("The Department [of Environmental Quality] shall be headed by a Director appointed by the Governor to serve at his pleasure for a term coincident with his own. The Director . . . shall, under the direction and control of the Governor, exercise such power and perform such duties as are conferred or imposed upon him by law and shall perform such other duties as may be required of him by the Governor. . . . ").

In sum, not only did Governor Gilmore conceive and engineer passage of the statutes, he has championed those statutory provisions and, as is reflected in the Virginia Code, he possesses the direct authority over his co-defendants to effect his clear aim of enforcement.[2] In my view, the Governor's connection to the disputed statutory provisions amply supports retaining him as a defendant in this case, even under a stringent test for applying the *Ex parte Young* exception such as that recently articulated by the Fifth Circuit. *See Okpalobi v. Foster*, 244 F.3d 405, 417, 2001 WL 242485, at *8 (5th Cir. 2001) (en banc) (plurality opinion) ("Any probe into the existence of a *Young* exception should gauge (1) the ability of the official

---

[2] Because this case does not squarely present the issue, I need not take a position here on whether a governor's general duty to uphold the law, without more, can be sufficient to invoke the exception to Eleventh Amendment immunity found in *Ex parte Young*.

11/30/01 FRI 17:16 FAX 102 341 8712 COCKLE PRINTING 006

to enforce the statute at issue under his statutory or constitutional powers, and (2) the demonstrated willingness of the official to enforce the statute.").[3]

I respectfully dissent from the majority opinion on this point only.

---

[3] At the very least, I would, rather than rule in favor of the Governor at this stage, remand this issue to the district court for a more extensive examination of the Governor's relevant statutory and constitutional powers in relation to the factual underpinnings of this case. Cf. *Lytle v. Griffith*, 240 F.3d 404, 410 (4th Cir. 2001) (where Eleventh Amendment immunity raised for first time on appeal, exercising discretion to remand the issue to the district court "to address in the first instance the relevant questions of fact and state law").

11/30/01 FRI 17:46 FAX 402 341 8712 COCKLE PRINTING 004

Civil Action Number 3:99CV425

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

WASTE MANAGEMENT HOLDINGS, INC., et al., Plaintiffs, v. JAMES S. GILMORE, III, in his official capacity as Governor of the Commonwealth of Virginia, et al., Defendants.

64 F. Supp. 2d 523; 1999 U.S. Dist. LEXIS 19852

June 30, 1999, Decided
June 30, 1999, Filed

DISPOSITION: Plaintiffs' Motion for a Preliminary Injunction GRANTED and Defendants ENJOINED from enforcing the challenged legislation pending the resolution of this matter.

COUNSEL: For WASTE MANAGEMENT HOLDINGS, INC. plaintiff: Robert Lawrence Bronston, Kenneth S. Geller, Evan M. Tager, Mayer, Brown & Platt, Washington, DC

For HALE INTERMODAL MARINE COMPANY, plaintiff: Shawn Alan Copeland, Hunton & Williams, Richmond, VA.

For HALE INTERMODAL MARINE COMPANY, plaintiff: John Early Holloway, Hunton & Williams, Norfolk, VA.

For WEANACK LAND LIMITED PARTNERS, plaintiff: Anthony F. Troy, James S. Crockett, Jr., Mays & Valentine, Richmond, VA.

For CHARLES CITY COUNTY, plaintiff: B. Randolph Boyd, Randolph, Boyd Cherry & Vaughn, Richmond, VA.

11/30/01 FRI 17:16 FAX 402 341 8712 COCKLE PRINTING 005

For BRUNSWICK WASTE MANAGEMENT FACILITY, L.L.C., consolidated plaintiff: Shawn Alan Copeland, David Alan Rudiin, Timothy George Hayes, Hunton & Williams, Meade Addison Spotts, Spotts, Smith, Fain & Rawls, Richmond, VA.

For BRUNSWICK WASTE MANAGEMENT FACILITY, L.L.C., consolidated plaintiff: Jason S. Thomas, Hunton & Williams, Raleigh, NC.

For JAMES S. GILMORE, III, defendant: Deborah Love Feild, Office Of The Attorney General, William Eugene Thro, Office of the Attorney General, Commonwealth of Virginia, Ellen Firsching Brown, Attorney General of Virginia, Stewart Todd Leeth, Assistant Attorney General, Richmond, VA.

JUDGES: James R. Spencer, UNITED STATES DISTRICT JUDGE.

OPINION BY: James R. Spencer

OPINION: MEMORANDUM OPINION

This matter is before the Court on Plaintiffs' Motion for a Preliminary Injunction. For the reasons stated herein, the Court GRANTS the motion in its entirety.

I. BACKGROUND

This is an action to enjoin the enforcement of several new Virginia statutes relating to the disposal and transportation of municipal solid waste. The challenged provisions are scheduled to take effect on July 1, 1999.

11/30/01 FRI 17:17 FAX 402 341 8712 COCKLE PRINTING 006

A. The Parties.

There are five plaintiffs in this now-consolidated action: (1) Waste Management Holdings, Inc. ("Waste Management"), whose affiliates operate several large landfills in Virginia that accept substantial quantities of out-of-state municipal solid waste; (2) Weanack Land Limited Partners ("Weanack"), which owns a transfer facility on the James River ("the James River Facility") where containerized shipments of municipal solid waste are offloaded from barges and onto tractor trailers[1]; (3) Hale Intermodal Marine Company ("Hale"), a barging company that transports, among other things, containerized municipal solid waste; (4) Charles City County, which owns property that it leases to Waste Management for use as a landfill ("the Charles City County landfill"); and (5) Brunswick Waste Management Facility, LLC ("Brunswick"), which owns and operates a large landfill in Brunswick County, Virginia. The defendants are James S. Gilmore, III, in his official capacity as Governor of the Commonwealth, John Woodley, in his official capacity as Secretary of Natural Resources; and Dennis Treacy, in his official capacity as Director of the Virginia Department of Environmental Quality (collectively, "the Commonwealth").

B. Municipal Solid Waste Disposal in Virginia.

According to a November 1998 report on the management of municipal solid waste in Virginia compiled by

---

[1] Waste Management operates the James River Facility under a contract with Weanack.

11/30/01 FRI 17:17 FAX 402 341 8712 COCKLE PRINTING

the Department of Environmental Quality ("DEQ") ("the DEQ Report"), there are presently 70 active landfills that accept municipal solid waste in the Commonwealth. (Waste Management App. 2 at 23.) Although the parties have quibbled somewhat about how many of those landfills accept municipal solid waste from other states, this much is clear: Seven "regional" landfills account for 97% of the out-of-state waste deposited in Virginia. Approximately 61 "local" landfills accept no out-of-state waste at all.

The regional landfills, which are privately operated and have substantially greater disposal capacity than their local counterparts, have been sited and constructed over the last ten years or so to comply with strict state and federal regulations.[2] Each has negotiated "host agreements" with the county in which it is located, whereby it pays the host a fee based on the volume of waste (excluding the host's waste) disposed.[3] These agreements also require the regional landfills to perform certain services for their host communities, such as providing free waste disposal and recycling services or paying for the cost of closing the communities' non-compliant local landfills. The construction of these regional landfills has required tens of millions of dollars in private investment, and the landfills face high operation and maintenance costs in addition to the payment of "host fees." To meet their

---

[2] Many of Virginia's local landfills could not comply with those regulations at the time they were enacted.

[3] For instance, Waste Management has paid Charles City County almost $3 million in host fees over the last nine years. (Wilson Decl., Waste Management Exh. 6, P 8.)

revenue needs and remain economically viable, each relies heavily on the disposal of out-of-state waste. (Wilson Decl. PP 7-9.) In fact, out-of-state waste accounts for 75% of the municipal solid waste accepted at the five regional landfills operated by Waste Management[4] (DEQ Report at 32) and almost 100% of the waste accepted at Brunswick's regional landfill. (Burrier Aff., Brunswick Exh. 1, P 15.)

Waste Management's agreements with its host counties permit it to dispose of well over 2,000 tons of municipal solid waste per day at all except one of its regional landfills, and, prior to the enactment of the challenged legislation, Waste Management intended to exceed that level in 1999. It further expected that three of its five regional landfills would accept substantially more waste in 1999 than they had in 1998. The Charles City County Landfill, for instance, has been disposing of 2,849 tons of waste per day this year, compared to less than 2,000 tons per day last year. (Wilson Decl. PP 11, 13-15.) Likewise, Brunswick disposed of approximately 2,400 tons per day in 1998, and in 1999 has accepted more than 2,800 tons per day. Before the enactment of the challenged legislation, it had expected to reach 5,000 tons per day by the end of the year 2000. (Burrier Aff. PP 10-11.) By contrast, not one of the sixty-one Virginia landfills that accept only

---

[4] Waste Management operates the following regional landfills: the Charles City County Landfill; the King George County Landfill and Recycling Facility; the Maplewood Recycling and Waste Disposal Facility, located in Amelia County; the Middle Peninsula Landfill and Recycling Center, located in Gloucester County; and the Atlantic Waste Disposal Landfill in Sussex County. (Wilson Decl. P 5.)

11/30/01 FRI 17:17 FAX 402 341 8712 COCKLE PRINTING 069

Virginia-generated waste has ever disposed of more than 2,000 tons per day, and only one or two of those might ever be expected to reach that level in the future. (Wilson Decl. P 13.) Indeed, according to a letter from the Virginia Department of Environmental Quality to the chief sponsor of the legislation at issue here, "most landfills operated by local governments receive less than 100 tons per day; a few receive closer to 500 tons per day." (Waste Management Reply App. 15.)

C Waste Management's Contracts to Dispose of Waste Generated in New York City.

For several decades, New York City has disposed of its residential municipal solid waste at the Fresh Kills landfill in Staten Island. In 1997, however, New York Governor George Pataki and New York City Mayor Rudolph Giuliani announced that the Fresh Kills landfill would cease accepting waste in December 2001. The New York City Department of Sanitation ("NYDOS") therefore began to negotiate interim disposal contracts to phase out its dependency on the Fresh Kills landfill. (Cekander Decl., Waste Management Exh. 2, PP 3-4). Waste Management has been awarded two of those contracts, and much of that waste has been disposed of at its regional landfills in Virginia. In March 1999, it bid on a third contract, which also contemplates the disposal of New York-generated waste in Virginia. (*Id.* PP 5, 7-8.)

Most significantly, Waste Management has bid on, and is a primary contender for, a twenty-year contract for the disposal of all or part of 12,000 tons of residential waste per day from Manhattan, Queens, Brooklyn, and

11/30/01 FRI 17:18 FAX 402 341 8712 COCKLE PRINTING 070

the Bronx. NYDOS's request for proposal ("RFP") specifically indicates a desire that the waste removed under this long-term contract be transported by barge and/or rail, rather than by truck. Waste Management's response contemplates sending 60% of the waste specified in the contract to Virginia landfills, particularly the Charles City landfill. It also contemplates that most of the waste will be containerized and transported by barge up the James River for offloading at the James River Facility. (*Id.* PP 10-11.)

In addition to the residential waste covered by its existing and pending contracts, Waste Management also removes significant quantities of commercial waste per day from New York City and surrounding communities. (Magrann Decl., Waste Management Exh. 5, P 3.) Waste Management has been transporting a substantial portion of this waste to Virginia landfills by tractor trailer, but in 1998 began planning to transport much of the waste by barge. In furtherance of this plan, it negotiated a contract with co-plaintiff Hale whereby Hale would lease to Waste Management four barges for five years at a fixed price, with an option to lease an additional two barges. Each barge is capable of carrying 5,000 tons of waste in specially constructed containers that can be stacked five high. Hale and Waste Management expected that barging would commence in March or April 1999, and that, initially, Waste Management would transport 2,500 to 3,000 tons per day from Brooklyn to the James River Facility, where it would be unloaded and delivered to the Charles City County landfill for disposal. (*Id.* PP 5-6.) Toward this end, Waste Management has agreed to purchase 400 American Bureau of Shipping-approved, double steel

11/30/01 FRI 17:48 FAX 402 341 8712 COCKLE PRINTING 071

walled containers at a cost of $10,000 per container. (*Id.* P 8.) It also has invested more than $5 million in improvements at the James River facility and has guaranteed payment on two cranes for offloading containers that together are worth more than $5 million. (Wilson Decl. P 19.)

Except for the small amount of waste generated on islands like Tangier and transported across the Chesapeake Bay, no in-state waste is transported to Virginia landfills by water.

D. Political Reaction to the Increased Importation of Out-of-State Waste Into Virginia.

In June 1998, DEQ issued a report indicating that, during the fourth quarter of 1997 alone, Virginia had imported 788,000 tons of solid waste and that most of it had been disposed of in large commercial facilities. (Waste Management Reply App. 2.) Around the same time, Waste Management's plans to significantly increase its importation of New York City's waste into Virginia began to attract greater notice. In July 1998, State Senator Bill Bolling, chief sponsor of the legislation at issue, wrote to Commonwealth Attorney General Mark Early about the possibility blocking those plans:

With the impending closure of the Fresh Kills Landfill in New York, I am concerned that the pressure for additional importation will increase even more in the next few years. If it is legally possible to do, I would like to introduce legislation during the 1999 session of the General Assembly that would place restrictions on such importations.

11/30/01 FRI 17:18 FAX 402 341 8712 COCKLE PRINTING 072

The legislation I am currently considering could take a number of forms. This legislation could seek to prohibit the importation of out-of-state waste altogether. In the alternative, I may seek to limit such importations to those landfills currently receiving out-of-state waste, and to levels reflective of their current importations. However, I do not want to propose such legislation if it would be in violation of federal or state law.

(Waste Management App. 4.) In August 1998, the Congressional Research Service issued a report indicating that Virginia now ranked second only to Pennsylvania as the nation's largest importer of municipal solid waste, taking in 2.8 million tons in 1997. On September 30, 1998, Senator Bolling announced his intention to introduce legislation aimed at out-of-state waste importation when the General Assembly reconvened in January 1999. In support of his proposals, Senator Bolling highlighted the Commonwealth's newly acquired ranking among waste importing states. Waste Management's recently announced contract to remove 2,400 tons of residential waste per day from New York City, "most if not all of [which] will be transported on Virginia's waterways," and the impending closure of the Fresh Kills landfill. "New York officials have made no secret of their intent to export the 14,000 tons of garbage a day that are currently disposed of in the Fresh Kills Landfill to other states. It appears as though the vast majority of this garbage may be headed to Virginia as well," Senator Bolling warned. (Waste Management App. 5.)

Governor Gilmore also expressed concern about the increased flow of out-of-state waste into Virginia's landfills. On September 29, 1998, he announced that he was

11/30/01 FRI 17:48 FAX 402 341 8712 COCKLE PRINTING 007

dispatching his top environmental officials to meet with their counterparts from other states "to ensure that Virginia does not drown in a regional sea of garbage." (Waste Management Reply App. 4.) In November, after the DEQ Report was released, the Governor imposed a moratorium on new landfill development and instructed Secretary Woodley to recommend legislation to deal with the problem. (Waste Management Reply App. 5.)

In his January 13, 1999 State of the Commonwealth address, Governor Gilmore proposed such legislation. Specifically referring to Waste Management's intentions, he noted that "just two days ago, a major trash company announced plans to import four thousand more tons of New York City trash into Virginia per day." To combat this increase, he announced, he would ask the General Assembly to prohibit the use of barges for transporting municipal solid waste on Virginia's waterways; impose new permit requirements for landfills; cap the amount of waste that may be deposited in Virginia landfills; and increase inspections of waste being hauled by truck or other means. (Waste Management App. 11.) When New York City Mayor Giuliani publicly suggested that Virginia might have an obligation to accept New York City's municipal waste, Governor Gilmore retorted that "the home state of Washington, Jefferson, and Madison has no intention of becoming New York's dumping grounds." (Waste Management Reply App. 10.)

Meanwhile numerous Virginia lawmakers and other state officials announced their support for Senator Bolling's and the Governor's efforts, frequently couching their positions in anti-out-of-state waste terms. (Waste Management App. 13-18.)

11/30/01 FRI 17:49 FAX 202 311 8712 COCKLE PRINTING 074

E. The Legislation at Issue.

In March and April 1999, the General Assembly approved and Governor Gilmore signed into law a number of amendments to the Code of Virginia that would impede the importation of out-of-state waste into the Commonwealth. Plaintiffs seek a preliminarily injunction against the following provisions:

1. The Cap Provision

First, the General Assembly capped the amount of waste that any landfill may accept at either (1) 2,000 tons per day or (2) the average amount accepted by the landfill in 1998, whichever is greater. 1999 Virginia Acts chs. 580, 611 (adding § 10.1-1408.3) ("the cap provision"). The cap provision also authorizes the Virginia Waste Management Board to grant individual requests for exceptions if, after considering "the potential human health, environmental, transportation infrastructure, and transportation safety impacts and needs," it determines that "(i) [an exception] protects present and future human health and safety and the environment; (ii) there is a need for the additional capacity; (iii) sufficient infrastructure will exist to safely handle the waste flow; (iv) the increase is consistent with the requirements of § 10.1-1408.3 [which establishes the cap]; (v) the public interest will be served by [the increase]; and (vi) the additional capacity is consistent with regional and local solid waste management plans developed to pursuant to § 10.1-1411." *Id.* (incorporating factors set out in amended version of § 10.1-1408.1(D)). In addition to these factors, the Board

11/30/01 FRI 17:49 FAX 402 341 8712 COCKLE PRINTING 075

must also consider "other factors it deems appropriate to protect the health, safety and welfare of the people of Virginia and Virginia's environmental and natural resources." *Id.* The Board may not approve an exception from the cap "until a public hearing on the proposed increase has been held in the locality where the landfill requesting the increase is located." *Id.*

2. The Barging Restrictions.

In addition to the cap provision, the General Assembly enacted two new amendments restricting the use of barges for the transport of solid waste on Virginia's waterways (collectively, "the barging restrictions").

a. The Stacking Provision.

Section 10.1-1454.1(A) of the Code of Virginia, enacted in 1998, requires the Virginia Waste Management Board to promulgate regulations governing the transport of municipal solid waste by ship, barge, or other vessel and the loading and unloading of such waste. Va. Code Ann. § 10.1-1454.1(A). Pursuant to the second provision challenged here, those regulations, which have yet to be issued, now must require that containerized waste be stacked no more than two high. 1999 Virginia Acts ch. 608 (amending Va. Code § 10.1-1454.1) ("the stacking provision") Under the amended version of Subsection B, "no facility shall receive wastes . . . by ship, barge, or other vessel prior to the effective date of the regulations promulgated pursuant to subsection A." *Id.* There is no deadline for the issuance of these regulations.

11/30/01 FRI 17:49 FAX 402 341 8712 COCKLE PRINTING 076

b. The Three-River Ban.

Finally, the General Assembly added § 10.1-1454.2 to the Virginia Code. This new section prohibits "the commercial transport of hazardous or nonhazardous solid waste by ship barge or other vessel [upon the] Rappahanock, James and York Rivers, to the fullest extent consistent with limitations posed by Constitution of the United States." 1999 Virginia Acts, chs. 583, 612 (adding § 10.1-1454.2) ("the three-river ban").

II. THE PRELIMINARY INJUNCTION STANDARD

A preliminary injunction is a unique remedy, the purpose of which is "to protect the plaintiff from irreparable injury and to preserve the court's power to render a meaningful decision after a trial on the merits." Wright, Miller, & Kane, Federal Practice and Procedure: Civil 2d § 2947 (2d ed. 1995). The analysis governing requests for such relief in this circuit is governed by *Blackwelder Furniture Co. v. Selig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977), and its progeny. First, the plaintiff must make a "clear showing" that it will likely suffer irreparable harm in the absence of preliminary injunctive relief. *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 812 (4th Cir. 1991). If the plaintiff makes such a showing, then the district court must balance the likelihood of harm to the plaintiff against the likelihood of harm to the defendant if injunctive relief is granted. *Id.* (citing *Blackwelder*, 550 F.2d at 195). If the "balance of harms" "tips decidedly in favor of the plaintiff," then a court may grant a preliminary injunction, so long as there are questions going to the merits that are sufficiently serious "as to make them fair

11/30/01 FRI 17:50 FAX 202 341 8712 COCKLE PRINTING 077

ground for litigation and thus more deliberate investigation." 952 F.2d at 812-13 (quoting *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991)). If, however, the balance does not tip decidedly in the plaintiff's favor, then a preliminary injunction should issue only if there is a "strong probability" that the plaintiff ultimately will prevail. 952 F.2d at 813. Finally, the court must consider "whether the public interest favors granting preliminary relief." *Multi-Channel TV Cable v. Charlottesville Qu. Cable*, 22 F.3d 546, 551 (4th Cir. 1994).[5]

---

[5] Relying upon *Virginia Surface Mining and Reclamation Association v. Andrus*, 604 F.2d 312 (1979), The Commonwealth has argued that the Blackwelder standard does not apply because it was formulated with private litigation in mind, whereas, in this case, Plaintiffs are seeking to enjoin a sovereign State from enforcing its presumably valid laws. Virginia Surface Mining is inapposite. There the Fourth Circuit held that the district court should not have applied *Blackwelder* in a challenge against the enforcement of the Surface Mining Control and Reclamation Act of 1977, because Congress had specified the applicable standard for injunctive relief in the challenged statute itself. *Id.* at 315. The court did not purport to establish a new standard for all cases in which plaintiffs seek to preliminarily enjoin enforcement of public laws. To the contrary, it has consistently applied *Blackwelder* in such cases. *See, e.g., Hazardous Waste Treatment Council v. State of South Carolina*, 945 F.2d 781, 787 (4th Cir. 1991) (applying *Blackwelder* standard in suit to enjoin enforcement of statutes, orders, and regulations dealing with disposal of hazardous waste); *Rum Creek*, 926 F.2d at 360 ("When the current statute is alleged to be unconstitutional and continued adherence to the statute pending the trial may affect the court's ability to make a meaningful decision, the *Blackwelder* standard properly applies.")

11/30/01 FRI 17:50 FAX 402 341 8712 COCKLE PRINTING 078

III. DISCUSSION

At the outset, the Court acknowledges that the management of municipal solid waste is a highly sensitive and difficult issue with strongly held views on both sides. It is not for the Court, however, to take sides in this debate. As the Fourth Circuit has observed in a similar case, it "can only apply the law." *Environmental Technology Council v. South Carolina*, 98 F.3d 774, 782 (4th Cir. 1996).

A. Likelihood that Plaintiffs Will Suffer Irreparable Harm if the Court Declines to Grant Preliminary Relief.

Before a court may grant preliminary injunctive relief, the plaintiff must make a "clear showing" that he will suffer irreparable harm if the court denies the request. If he fails to make such a showing, then the analysis is at an end. That said, the plaintiff need not make a precise showing of the damages that he will suffer in the absence of a preliminary injunction. Indeed, the irreparable injury requirement may be satisfied where damages are "difficult to ascertain," such as a case in which "the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor or the loss of goodwill." *Multi-Channel TV Cable*, 22 F.3d at 551-52. Furthermore, where the only possible remedy ultimately available to the plaintiff is injunctive relief, the requisite showing will be "less strict than in other instances where future monetary remedies are available." *Rum Creek*, 926 F.2d at 362.

In this case, the Court is satisfied that failure to enjoin the cap provision and the barging restrictions will

11/30/01 FRI 17:50 FAX 402 341 8712 COCKLE PRINTING 079

irreparably harm Plaintiffs. Not only will they have to immediately curtail their present disposal of waste at certain landfills and divert that waste to other landfills at greater cost, but they may lose potential business opportunities as well. Given that the Eleventh Amendment shields Defendants against claims for money damages, Plaintiffs will never be able recover those losses, even if they ultimately prevail on the merits. Therefore, the Court must proceed to the rest of the *Blackwelder* analysis.

B. Likelihood of Harm to The Commonwealth if Court Grants Preliminary Injunction.

The next step in the *Blackwelder* analysis is to balance the irreparable harm that Plaintiffs will suffer in the absence of a preliminary injunction against the harm that the Commonwealth likely will suffer if the Court grants a preliminary injunction. The Court finds that the risk of harm to the Commonwealth is minimal. First, as to the cap provision, it is undisputed that the regional landfills affected by the cap have enormous excess capacity. Indeed, were that not the case, there would have been no need for the Commonwealth to limit their daily intake in the first place. The Commonwealth is therefore unlikely to suffer any appreciable harm should the Court enjoin the enforcement of the cap provision for the short time that it will take to finally resolve this case on the merits. Likewise, a preliminary injunction against the barging restrictions poses little risk of harm to the Commonwealth. Plaintiffs have presented substantial evidence that container barges are a safe and environmentally

11/30/01 FRI 17:50 FAX 402 341 8712 COCKLE PRINTING 080

friendly mode of transporting waste, and the Commonwealth has presented no evidence to the contrary. Instead, the Commonwealth has argued that the Court should deny the requested relief because Plaintiffs have not affirmatively proved that there will not be a barging accident between now and when this case is ultimately resolved. Plaintiffs need not prove a negative, however, in order to obtain the requested relief. They need only show that the harm they are likely to suffer in the absence of a preliminary injunction outweighs the harm that the Commonwealth is likely to suffer if the Court grants a preliminary injunction. They have satisfied that burden.

C. Probability of Success on the Merits.

As noted above, under *Blackwelder* and its progeny, if the "balance of harms" tips decidedly in the plaintiff's favor, then a court may grant a preliminary injunction, so long as there are serious questions going to the ultimate merits of the case. If, however, the balance does not tip so decidedly, then a preliminary injunction should issue only if there is a "strong probability" that the plaintiff ultimately will prevail. In this case, Plaintiffs have challenged both the cap provision and the barging restrictions on Commerce Clause grounds. They have also challenged the barging restrictions on Supremacy Clause grounds.[6] As explained further below, the Court is of the view that both sets of restrictions are almost certainly invalid under

[6] Brunswick has only challenged the cap provision and, for the purposes of this motion, has limited its argument to the Commerce Clause.

11 30/01 FRI 17:51 FAX 402 341 5712 COCKLE PRINTING 002

the Commerce Clause. Accordingly, it declines to address the Supremacy Clause argument.

1. General Commerce Clause Principles.

The Commerce Clause of the United States Constitution grants Congress "the Power . . . to regulate Commerce . . . among the several States." Art. I, § 8, cl. 3. Although the Commerce Clause is phrased as a delegation of power to Congress, it "has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden" the free flow of commerce across state lines. *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality*, 511 U.S. 93, 98, 114 S. Ct. 1345, 1349, 128 L. Ed. 2d 13 (1994). This limitation on state power reflects the framers' firm belief that in order for the new Union to succeed, it "would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Id.* (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-26, 99 S. Ct. 1727, 1731, 60 L. Ed. 2d 250 (1979)). With this principle in mind, the Supreme Court has repeatedly held that the Commerce Clause forbids one State from attempting "to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628, 98 S. Ct. 2531, 2538, 57 L. Ed. 2d 475 (1978). Furthermore, states may not circumvent this prohibition simply by crafting restrictions which appear, on their face, to be neutral, for the Commerce Clause "forbids discrimination

11 30/01 FRI 17:51 FAX 402 341 8712 COCKLE PRINTING 082

whether forthright or ingenious." *Environmental Technology Council*, 98 F.3d at 787-88 (quoting *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, ___, 114 S. Ct. 2205, 2215-16, 129 L. Ed. 2d 157 (1994)). Finally, it is beyond question that the free flow of waste across state lines is protected by the Commerce Clause, and that the States have no more power to discriminate against its importation than they do to discriminate against other articles of commerce.[7]

Over the years, the Supreme Court has developed a two-tiered analysis for determining whether a particular state law violates the "negative" aspect of the Commerce Clause. First, where a law discriminates against out-of-state interests "facially, in its practical effect, or in its purpose," it will only survive judicial scrutiny if the defendant can show that (1) it "is demonstrably justified by a valid factor unrelated to economic protectionism" and (2) "there are no nondiscriminatory alternatives adequate to preserve the local interests at stake." *Environmental Technology Council*, 98 F.3d at 785 (citing cases). This standard has been characterized as "a virtually per

---

[7] *See, e.g., City of Philadelphia, supra* (invalidating New Jersey statute prohibiting importation of most solid or liquid waste originating outside New Jersey); *Chemical Waste Management v. Hunt*, 504 U.S. 334, 112 S. Ct. 2009, 119 L. Ed. 2d 121 (1992) (striking down statute imposing an additional fee on all hazardous waste generated outside Alabama and disposed of at Alabama facilities); *Oregon Waste Systems, supra* (striking down $2.50 per ton surcharge on disposal of solid waste generated in other states); *Environmental Technology Council, supra* (invalidating various South Carolina laws intended to limit the amount of out-of-state hazardous waste buried within the State's borders).

11/30/01 FRI 17:51 FAX 402 341 8712 COCKLE PRINTING 083

se rule of invalidity," for the Supreme Court has upheld such discriminatory laws only in a few instances where the discrimination was justified by the threat of death or disease. *Id.* (citing *Maine v. Taylor*, 477 U.S. 131, 106 S. Ct. 2440, 91 L. Ed. 2d 110 (1986) (upholding Maine's prohibition on importing live baitfish because they threatened destruction of Maine's fisheries); *Clason v. Indiana*, 306 U.S. 439, 59 S. Ct. 609, 83 L. Ed. 858 (1939) (upholding Indiana's restrictions on transporting dead animals without a license)).

A more forgiving standard of review applies, however, "where the statute regulates evenhandedly to effectuate a legitimate public interest, and its effects on interstate commerce are only incidental." *City of Philadelphia*, 437 U.S. at 624, 98 S. Ct. at 2535 (quoting *Pike v. Bruce Church*, 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L. Ed. 2d 174 (1970)). Specifically, such legislation "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* This standard reflects the Court's recognition that "incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people." 437 U.S. at 623-24, 98 S. Ct. at 2535.

As the Fourth Circuit has observed, the line between those laws that are subject to strict scrutiny (and presumptively invalid) and those that are subject to the more relaxed standard of review "is not clear." *Environmental Technology Council*, 98 F.3d at 785. "The crucial inquiry," however, is whether the legislation at issue "is basically protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects

11/30/01 FRI 17:51 FAX 402 341 5712 COCKLE PRINTING 084

upon interstate commerce that are only incidental." *City of Philadelphia*, 437 U.S. at 624, 98 S. Ct. at 2536. The Court has little trouble concluding that the provisions challenged here fall into the former category.[8]

2. The Appropriate Level of Scrutiny.

The parties agree that the challenged statutes do not discriminate against interstate waste on their face. The

[8] In its response to Brunswick's memorandum in support of the pending motion, the Commonwealth has taken the position that the provisions at issue here are not, in fact, subject to Commerce Clause scrutiny, because Congress has specifically authorized the states to interfere with the interstate flow of solid waste through Subtitle D of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6941, et seq. Although it is well-established that Congress may affirmatively allow the states to discriminate against interstate commerce and thereby validate what otherwise would be unconstitutional state action, "in order for a state law to be removed from the reach of the dormant Commerce Clause . . . congressional intent to authorize the discriminating law must be either 'unmistakably clear' or 'expressly stated.' " *Environmental Technology Council*, 98 F.3d at 782 (citing cases). In the Court's view, none of the statutory and legislative history excerpts on which the Commonwealth relies express an "unmistakably clear" congressional intent to authorize the legislation at issue here. To the contrary, they merely express a general desire to leave the management of solid waste disposal largely in state and local hands rather than dramatically expand federal regulation over the activity. Indeed, the Commonwealth's characterization of RCRA as an "unmistakably clear" authorization is belied by the fact that Congress has debated interstate waste control legislation on numerous occasions over the last several years. Were RCRA's intent as clear as the Commonwealth would have it, there would be no need for such legislation.

11/30/01 FRI 17:52 FAX 402 341 8712 COCKLE PRINTING 085

Court concludes, however, that they are plainly discriminatory in both their purpose and "practical effect."

a. Virginia's Underlying Purpose.

The timing of the General Assembly's actions and the statements made by the legislation's chief proponents, including Governor Gilmore, leave no room for doubt that it was enacted with one overriding purpose: to restrict the importation of out-of-state waste, particularly New York waste, into the Commonwealth. In explaining their objectives, the Governor and others repeatedly cited Virginia's newly publicized status as the nation's second leading importer of out-of-state municipal waste and the impending closure of the Fresh Kills landfill in New York. At the same time, they expressed a desire to minimize any restrictions on the disposal of Virginia-generated trash. At a January 5, 1999 hearing before the Senate Solid Waste Subcommittee, for instance, Senator Bolling advised the panel that, based on the concerns he had heard from other Virginia officials, he had revised the cap provision so that, rather than capping all landfills at their 1998 levels, it would, as a practical matter, affect only about six large landfills that primarily accept out-of-state waste. (Pltfs' Reply App. 16.) The Commonwealth's revisionist explanations to the contrary notwithstanding, it is impossible to review this record without concluding that the challenged provisions were motivated by an undisguised animus against the importation of out-of-state municipal solid waste.[9]

---

[9] Indeed, lest there be any misunderstanding about the Commonwealth's aim, the Governor's press secretary declared

11/30/01 FRI 17:52 FAX 402 341 8712 COCKLE PRINTING 086

b. The Practical Effect of the Challenged Provisions.

Similarly, there is no question but that the practical effect of both the barging restrictions and the cap provision will be to burden the flow of out-of-state waste across Virginia's borders while leaving in-state waste unaffected. Given the Commonwealth's avowed purpose, this is not at all surprising.

i. The Barging Restrictions.

Though facially neutral, the three-river ban and the stacking provision will exclusively burden out-of-state waste. No Virginia-generated waste is transported on the James, York, or Rappahanock. The small amount of in-state waste that is transported by water is shipped from small islands in the Chesapeake Bay to the mainland. Meanwhile, as the General Assembly knew, Waste Management has transported substantial amounts of municipal solid waste from New York up the James River in the past, and planned to begin doing so again this year. It also intends to utilize the James if it secures the long-term contract with NYDOS.

---

shortly after the hearing on Plaintiffs' motion that the Court's decision to grant a preliminary injunction would not "keep the governor from vigorously working to protect the environment . . . and preventing Virginia from becoming the trash import destination for the country." Craig Timberg, Va. Laws on Imports of Trash Blocked, Washington Post, June 30, 1999, at A1.

11/30/01 FRI 17:52 FAX 402 341 5712 COCKLE PRINTING 0087

The stacking provision will have a similarly lopsided effect, because no Virginia-generated waste is transported by container barge. Indeed, it appears that the stacking provision would essentially preclude the use of container barges in Virginia because it would prohibit them from being loaded to more than half-full, which would make them an economically impractical mode of transportation.

The Commonwealth argues that the barging restrictions do not discriminate in practical effect because (1) no waste is being barged right now, and (2) the restrictions burden both in-state and out-of-state interests. One of the plaintiffs in this action, the Commonwealth notes, is a Virginia county. The Court is not persuaded. Whether or not any out-of-state waste is presently being barged into Virginia, Waste Management has used barges in the recent past, and, as the Commonwealth knows well, plans to resume barging in the near future. Were that not the case, there would have been no reason for the General Assembly to enact the restrictions in the first place. Nor does the fact that some in-state actors will also be affected by the barging restrictions insulate those restrictions from a Commerce Clause challenge. Any time that a State attempts to limit the importation of an article of commerce, there will be some in-state interests that will suffer. The key inquiry is whether the legislation at issue erects a barrier to the flow of commerce across Virginia's borders while leaving traffic within the state unaffected. Such is clearly the case with the barging restrictions. They are therefore subject to strict scrutiny.[10]

---

[10] In its papers and at argument, the Commonwealth has taken the untenable position that the three-river ban cannot

11/30/01 FRI 17:52 FAX 402 341 8712 COCKLE PRINTING 088

ii. The Cap Provision.

The Supreme Court has repeatedly stated in the course of striking down other types of restrictions that an evenhanded waste disposal cap might pass constitutional muster, so long as it did not discriminate between in-state and out-of-state waste. *See City of Philadelphia*, 437 U.S. at 626, 98 S. Ct. at 2537; *Chemical Waste Management*, 504 U.S. at 345, 112 S. Ct. at 2015; *Fort Gratiot Sanitary Landfill v. Michigan Dept. of Natural Resources*, 504 U.S. 353, 367, 112 S. Ct. 2019, 2027; 119 L. Ed. 2d 139 (1992). Given the practical impact of the Commonwealth's cap provision, however, it cannot be classified as "evenhanded" by any stretch of the imagination. Of the 61 landfills that presently accept Virginia-generated waste exclusively, not one takes in anywhere close to 2,000 tons per day. It is only the large regional landfills, which accept virtually all of the out-of-state waste disposed of in Virginia and rely heavily on out-of-state waste to meet their revenue needs, that will be affected by the cap. Nor is the cap provision rendered any less objectionable by virtue of the fact that the affected landfills may apply for waivers from the

---

possibly be construed as unconstitutional because it contains a "savings clause," which provides that it shall apply "to the fullest extent consistent with the limitations posed by the Constitution of the United States." This is like arguing that a state law prohibiting public universities from hiring African Americans is immune from challenge under the Equal Protection Clause because it contains language stating that it will only apply insofar as the Constitution permits. The fact is that the Constitution does not permit the challenged legislation at all. It therefore may not be "saved" by a "savings clause."

11 30/01 FRI 17:53 FAX 402 341 9712 COCKLE PRINTING 089

Virginia Waste Management Board. As the Supreme Court observed in *Secretary of State v. J.H. Munson Co.*, "the possibility of a waiver may decrease the number of impermissible applications of the statute, but it does nothing to remedy the statute's fundamental defect." 467 U.S. 947, 968, 104 S. Ct. 2839, 2853, 81 L. Ed. 2d 786 (1984). The Court therefore finds that the cap provision is not a neutral statute with "only incidental" effects upon interstate commerce, but is, rather, a protectionist measure intended to "saddle those outside the State with most of the burden of slowing the flow of waste" into Virginia's landfills. *Chemical Waste Management*, 504 U.S. at 346, 112 S. Ct. at 2016. It, too, is therefore subject to strict scrutiny.

3. Application.

As noted above, a finding that a state law discriminates against interstate commerce triggers a virtual per se rule of invalidity. The challenged provisions will only survive if the Commonwealth can prove that they are "demonstrably justified by a valid factor unrelated to economic protectionism" and that "there are no nondiscriminatory alternatives adequate to preserve the local interests at stake." *Environmental Technology Council*, 98 F.3d at 785. It appears highly unlikely that it will be able to satisfy this standard.

The Commonwealth has cited a variety of reasons for the challenged legislation. First, it points out Virginia's need to preserve landfill capacity and to limit their growth at a reasonable level. The Supreme Court has squarely rejected the notion, however, that "resource protectionism" is a valid defense to a Commerce Clause

11/30/01 FRI 17:53 FAX 402 341 9712 COCKLE PRINTING 090

challenge. *Oregon Waste Systems, supra,* 511 U.S. at 107, 114 S. Ct. at 1354 ("Even assuming that landfill space is a 'natural resource,' 'a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources within its borders.' ") (quoting *City of Philadelphia,* 437 U.S. at 627, 98 S. Ct. at 2537). The Commonwealth also contends that the laws are justified by Virginia's desire to protect the health and safety of its citizens and the environment. Although these are clearly valid policy concerns, the Supreme Court has made clear that a state may not address those concerns by discriminating against out-of-state waste. *Chemical Waste Management,* 504 U.S. at 345-46, 112 S. Ct. at 2015-16 ("To the extent that Alabama's concern touches environmental conservation and the health and safety of its citizens, such concern does not vary with the point-of origin of the waste, and it remains within the State's power to monitor and regulate more closely the transportation of all hazardous waste within its borders.")[11]

Nor is it likely that the Commonwealth will be able to prove that there are no nondiscriminatory means of achieving Virginia's policy objectives. With respect to the cap provision, for instance, Virginia might have imposed a cap that froze all landfills at current disposal levels,

---

[11] In response to Brunswick's memorandum in support of the motion and at hearing, the Commonwealth suggested that it is justified in distinguishing between New York waste and Virginia waste because New York law permits the disposal of certain items that Virginia law does not. The Commonwealth may, of course, place neutral restrictions on the type of waste that is deposited in its landfills. It may not, however, try to block altogether the importation of another State's waste.

11/30/01 FRI 17:53 FAX 402 341 5712 COCKLE PRINTING 091

rather than one designed to affect only those that accept mostly out-of-state waste.[12] As for the barging restrictions, Virginia clearly could address its health, safety, and environmental concerns without totally prohibiting the use of container barges for transporting solid waste. Indeed, the General Assembly approved such legislation in 1998 in the form of Va. Code § 10.1-1454.1. That section requires that solid waste transported by water be carried in containers "designed, constructed, loaded, operated, and maintained so as to prevent the escape of liquids, waste and odors and to prevent the loss or spillage of waste in the event of an accident." § 10.1-1454.1(F). It further requires the Virginia Waste Management Board to promulgate regulations along those lines. § 10.1-1454.1(A). The General Assembly acted to effectively preclude the use of container barges for transporting interstate waste, however, before the Board ever issued its regulations.

D The Public Interest.

As another district court observed in a case where the plaintiffs sought to preliminarily enjoin the enforcement of a Mecklenburg County "flow control" ordinance, "determining whether the public interest would be served by the issuance of a preliminary injunction has proven to be quite elusive," for the problems at issue here are "complex, multi-faceted, and involve many uncertainties." *Container Corporation of Carolina v. Mecklenburg*

---

[12] In fact, as noted above, an early version of Senator Bolling's legislation contained just such a limitation.

11/30/01 FRI 17:54 FAX 402 311 8712 COCKLE PRINTING 082

County, 1995 WL 360185 *12 (W.D.N.C. 1992) (unpublished). That said, to the extent that the public interest points in either party's favor, the Court finds that it supports the granting of a preliminary injunction in order to protect the free flow of interstate commerce from unconstitutional interference. Today, it is Virginia that is seeking to stop the flow of New York's garbage across its borders. Tomorrow it may be New York that attempts to block the importation of Virginia's tobacco, another article of commerce that has fallen into public disfavor. Such interstate commercial warfare is clearly in no one's interest.

IV. CONCLUSION

In conclusion, the Court finds that Plaintiffs have made the necessary showing of irreparable harm and that the "balance of harms" tips in their favor. Furthermore, Plaintiffs almost certainly will succeed on the merits. As in *Environmental Technology Council*, it is clear that the challenged provisions constitute "an integrated and interconnected discriminatory program" whereby Virginia has "attempted to isolate itself from a problem common to [the nation] by erecting a barrier against the movement of interstate trade." 98 F.3d at 786 (internal quotations and citations omitted). This is precisely what the Commerce Clause forbids. Accordingly, the Court will GRANT the motion and ENJOIN Defendants from enforcing the challenged legislation pending the resolution of this matter.

Let the Clerk send a copy of this Memorandum Opinion to all counsel of record.

11/30/01 FRI 17:54 FAX 402 341 9712 COCKLE PRINTING 093

James R. Spencer

UNITED STATES DISTRICT JUDGE

June 30, 1999
DATE

ORDER

THIS MATTER is before the Court on Plaintiffs' Motion for a Preliminary Injunction. For the reasons stated in the accompanying Memorandum Opinion, the Court hereby GRANTS the motion and ENJOINS Defendants from taking any action to enforce the following provisions of Virginia law until this case is resolved on the merits:

1. That part of 1999 Virginia Acts chapters 580 and 611 adding Va. Code § 10.1-1408.3 ("the cap provision").

2. That part of 1999 Virginia Acts chapter 608 amending Va. Code § 10.1-1454.1 to prohibit the use of barges for the transport of solid waste on the navigable waters of Virginia until the Virginia Waste Management Board promulgates regulations pursuant to § 10.1-1451(A), and requiring that such regulations prohibit the stacking of waste containers more than two high ("the stacking provision").

3. 1999 Virginia Acts chapters 583 and 612, adding § 10.1-1454.2 to the Virginia Code ("the three-river ban").

Pursuant to Federal Rule of Civil Procedure 65(c), the Court fixes bond at $1,000 for each plaintiff. Plaintiffs shall post bond with the Clerk of the Court no later than 5:00 p.m. on July 1, 1999.

11/30/01 FRI 17:55 FAX 402 341 8712 COCKLE PRINTING 001

Let the Clerk send a copy of this Order to all counsel of record.

And it is SO ORDERED.

James R. Spencer

UNITED STATES DISTRICT JUDGE

June 30, 1999
DATE

11/30/01 FRI 17:56 FAX 402 311 9712 COCKLE PRINTING 002

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

WASTE MANAGEMENT HOLDINGS, INC., et al., Plaintiffs, v. JAMES S. GILMORE, III, et al., Defendants.

Civil Action Number 3:99CV425

64 F. Supp. 2d 537; 1999 U.S. Dist. LEXIS 13508; 30 ELR20090

August 30, 1999, Decided

DISPOSITION: Counts II, IV and VIII of Waste Management Complaint and Count VI of Brunswick Complaint dismissed. In all other respects Defendants' Motion to Dismiss DENIED.

COUNSEL: For WASTE MANAGEMENT HOLDINGS, INC., plaintiff: Robert Lawrence Bronston, Kenneth S. Geller, Evan M. Tager, Mayer, Brown & Platt, Washington, DC.

For HALE INTERMODAL MARINE COMPANY, plaintiff: Shawn Alan Copeland, Hunton & Williams, Richmond, VA.

For HALE INTERMODAL MARINE COMPANY, plaintiff: John Early Holloway, Hunton & Williams, Norfolk, VA.

For WEANACK LAND LIMITED PARTNERS, plaintiff: Anthony F. Troy, James S. Crockett, Jr., Mays & Valentine, Richmond, VA

For CHARLES CITY COUNTY, plaintiff: B. Randolph Boyd, Randolph, Boyd, Cherry & Vaughn, Richmond, VA.

For BRUNSWICK WASTE MANAGEMENT FACILITY, L.L.C., consolidated plaintiff: Shawn Alan Copeland,

11/30/01 FRI 17:56 FAX 402 341 8712 COCKLE PRINTING 003

David Alan Rudlin Timothy George Hayes, Hunton & Williams, Richmond VA.

For BRUNSWICK WASTE MANAGEMENT FACILITY, L.L.C., consolidated plaintiff: Meade Addison Spotts, Spotts, Smith, Fain & Rawls, Richmond, VA.

For BRUNSWICK WASTE MANAGEMENT FACILITY, L.L.C., consolidated plaintiff: Jason S. Thomas, Hunton & Williams, Raleigh, NC.

For JAMES S. GILMORE, III, JOHN PAUL WOODLEY, JR., DENNIS TREACY, JR., defendants: Deborah Love Feild, Office Of The Attorney General, Richmond, VA.

For JAMES S. GILMORE, III, JOHN PAUL WOODLEY, JR., DENNIS TREACY, JR., defendants: Ellen Firsching Brown, Attorney General of Virginia, Richmond, VA.

For JAMES S. GILMORE, III, JOHN PAUL WOODLEY, JR., DENNIS TREACY, JR., defendants: Stewart Todd Leeth, Assistant Attorney General, Richmond, VA.

For JAMES S. GILMORE, III, JOHN PAUL WOODLEY, JR., DENNIS TREACY, JR., defendants: William Eugene Thro, Office of the Attorney General, Commonwealth of Virginia, Richmond, VA.

For THE NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, amicus: Meade Addison Spotts, Spotts, Smith, Fain & Rawls, Richmond, VA.

For THE NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, amicus: Hugh McCoy Fain, III, Spotts, Smith, Fain & Buis, P.C., Richmond, VA.

11/30/01 FRI 17:56 FAX 102 311 9712 COCKLE PRINTING 004

For BFI WASTE SYSTEMS OF NORTH AMERICA, INC., amicus: Hugh McCoy Fain, III, Meade Addison Spotts, Spotts, Smith, Fain & Rawls, Richmond, VA.

For BFI WASTE SYSTEMS OF NORTH AMERICA, INC., amicus: John H. Turner, BFI Waste Systems of North America, Inc.

JUDGES: James R. Spencer, UNITED STATES DISTRICT JUDGE.

OPINION BY: James R. Spencer

OPINION: MEMORANDUM OPINION

This matter is before the Court on Defendants' ("the Commonwealth" or "Virginia") Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons stated herein, the Court DENIES the motion, except as it relates to Plaintiffs' Contract Clause claims (Waste Management Complaint, Counts II, IV, and VIII; Brunswick Complaint, Count VI).

I. BACKGROUND

This is a suit for declaratory judgment and to enjoin the enforcement of several recently enacted Virginia statutes aimed at curtailing the flow of out-of-state municipal solid waste into the Commonwealth.[1] Plaintiffs contend that the new laws violate the Commerce, Contracts,

[1] The factual background is set forth fully in the Court's Memorandum Opinion on Plaintiffs' Motion for a Preliminary Injunction. *Waste Management Holdings, Inc. v. Gilmore*, 64 F. Supp. 2d 537 (E.D. Va. 1999).

11/30/01 FRI 17:56 FAX 102 [illegible] 9712 COCKLE PRINTING 003

Supremacy, and Equal Protection clauses of the United States Constitution. In an apparent effort to recover attorneys' fees pursuant to 42 U.S.C. § 1988, they have sought relief under 42 U.S.C. § 1983.

The Commonwealth has moved to dismiss Plaintiffs' Complaints[2] in their entirety on two grounds: first, that Plaintiffs lack standing to challenge the disputed laws, because Virginia's counties had no authority to enter into the "host agreements" that "form the basis of this litigation" (Defs' Mem. in Supp. at 4), and second, that the suit is barred by the Eleventh Amendment and the doctrine of sovereign immunity. In addition, the Commonwealth has separately targeted each of Plaintiffs' individual constitutional claims. Finally, the Commonwealth argues that Charles City County must be dismissed as a plaintiff, because it lacks standing to sue its creator.

II. RULE 12(B)(6) STANDARD

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a party to move for dismissal of a claim on the ground that it fails to state a claim upon which relief can be granted. When considering such a motion, a court must presume that all factual allegations in the complaint are true, and all reasonable inferences must be construed in the light most favorable to the non-moving party. *Martin Marietta v. International Telecommunications Satellite*

---

[2] Two complaints were filed against the Commonwealth before this action was consolidated, one by Waste Management Holdings, Inc. ("Waste Management"), et al., the other by Brunswick Waste Management, L.L.C. ("Brunswick").

11/30/01 FRI 17:56 FAX 402 341 8712 COCKLE PRINTING 006

Org., 991 F.2d 94, 97 (4th Cir. 1992). No claim should be dismissed unless it appears beyond a doubt that the plaintiff could not recover under any set of facts which could be proven. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957); *Labram v. Havel*, 43 F.3d 918, 920 (4th Cir. 1995).

III. DISCUSSION

A. The Commonwealth's Contention that Plaintiffs Lack Standing Because Virginia Counties Lack Authority to Enter Into the "Host Agreements".

As detailed in both Complaints, each of the seven large regional landfills likely to be affected by the disputed statutes is privately operated under a voluntary agreement between the "host" county and the waste disposal company that operates the landfill. (Waste Management Complaint P 16, Brunswick Complaint P 16.) Pursuant to these "host agreements," the waste disposal companies constructed the regional landfills, pay the host counties a fee based on the volume of waste disposed, and perform certain services for the host communities, such as free waste disposal and closure of substandard landfills. (Waste Management Complaint P 18, Brunswick Complaint P 16.) Each of the landfills was built with the expectation that, in order to meet its revenue needs and provide a reasonable return on investment, it would accept substantial quantities of out-of-state municipal solid waste. (*Id.*)

The Commonwealth argues that Virginia's counties have no authority "to operate or contract for the operation of a municipal landfill for-profit that accepts out-of-

11/30/01 FRI 17:57 FAX 402 311 8712 COCKLE PRINTING 007

state waste." (Defs' Mem. in Supp. at 4.) Accordingly, "these host agreements and the Counties' actions with regard to acceptance of interstate waste at these municipal landfills are ultra vires and unlawful." (*Id.* at 5.) Since the host agreements "form the basis of this litigation" (*Id.* at 4), the Commonwealth reasons, "Plaintiffs do not have standing to raise the challenges asserted in their Complaints, and both Complaints must be dismissed." (*Id.*) For the purposes of deciding this motion, the Court will accept the Commonwealth's argument that the counties' authority is relevant to Plaintiffs' standing. It disagrees, however, that the host agreements are illegal under Virginia law.

As the Commonwealth stresses, Virginia's courts follow "Dillon's Rule," which holds that a municipal corporation possesses only those powers that are (1) expressly granted by the Commonwealth, (2) "necessarily or fairly implied in or incidental to the powers expressly granted, or (3) "essential to the declared objects and purposes of the corporation, not simply convenient but indispensable." *City of Richmond v. Board of Supervisors of Henrico County*, 199 Va. 679, 101 S.E.2d 641, 645 (Va. 1958). "Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation and the power is denied." *Id.* Turning to this case, § 15.2-932 of the Virginia Code grants "any locality" authority "to contract with any person, whether profit or nonprofit, for garbage or refuse pickup and disposal services in its locality and to enter into contracts relating to waste disposal facilities which recover energy or materials from garbage, trash, and refuse." Va. Code Ann. § 15.2-932 (Michie 1997) (emphasis added). A possible

11/30/01 FRI 17:57 FAX 402 341 8712 COCKLE PRINTING 008

reading of this statute – and the one that the Commonwealth urges upon the Court – is that it gives Virginia counties the power to contract only for the disposal of their own waste. Thus, were this an entirely open question, one might reasonably argue that the host agreements negotiated by the counties exceed the scope of authority bestowed by the General Assembly.

Unfortunately for the Commonwealth, however, this is not an open question, for the Supreme Court of Virginia has strongly indicated, albeit in dicta, that counties do possess the authority that the Commonwealth says they lack. In *Concerned Residents of Gloucester County v. Board of Supervisors of Gloucester County*, a local citizens group challenged the validity of the host agreement between *Waste Management and Gloucester County*. 449 S.E.2d 787, 789, 248 Va. 488 (Va. 1994). Although the plaintiffs did not raise the same argument that the Commonwealth makes, the court left little doubt about its position on the question. "At the outset," it noted, "the General Assembly has declared the public policy of Virginia respecting the collection and disposal of solid waste and has granted local governments extensive power in this matter." *Id.* (emphasis added). The court then proceeded to quote the Virginia Code at length, concluding:

> Where, as here, the General Assembly has authorized the County "to provide for the health and safety of its citizens . . . and to promote the general health and welfare by providing for adequate [waste] disposal services," Code § 15.1-28.01,[3] action taken by the County

[3] This section is now codified at Va. Code § 15.2-931.

11/30/01 FRI 17:57 FAX 402 341 6712 COCKLE PRINTING 009

> in response thereto is a legislative act in the furtherance of the County's police powers. . . . When a legislative body exercises its police powers, every possible presumption shall be indulged in favor of the validity of the legislative act.

Id. at 790 (citations omitted) (emphasis added). Later, responding to the plaintiffs' argument that the host agreement impermissibly tied the hands of future boards of supervisors, the court remarked: "It is firmly established that 'a county is capable of contracting and has the power to make all contracts which are proper and reasonably necessary to the execution of its corporate objects and purposes.' . . . In the present case . . . the General Assembly has authorized the County to contract for the collection and disposal of solid waste. The legislative intent could not be more clear." *Id.* at 794 (citations omitted) Similarly, in *Concerned Taxpayers of Brunswick County v. County of Brunswick*, the plaintiffs sought to block the construction of the Brunswick County regional landfill, arguing, among other things, that the County Board of Supervisors had negotiated its host agreement in violation of the *Virginia Public Procurement Act*. 455 S.E.2d 712, 717-18, 249 Va. 320 (Va. 1995). The court rejected this argument out of hand: "The bill of complaint . . . does not allege acts by any of the defendants that exceed their powers. Local governing bodies are expressly authorized to enter into contracts relating to waste disposal facilities." *Id.* at 718 (citing Va. Code §§ 15.01-28.01 and 15.01-28.02 (now §§ 15.2-931 and 15.2-932) and *Concerned Residents of Gloucester County*, 449 S.E.2d 787 at 793, 248 Va. 488.) In light of these unwavering pronouncements by Virginia's highest court, this Court cannot accept the

11/30/01 FRI 17:57 FAX 402 312 8712 COCKLE PRINTING 010

Commonwealth's argument that the host agreements are "ultra vires" under Virginia law.

B. The Commonwealth's Argument that the Action is Barred by the Doctrine of Sovereign Immunity.

The Commonwealth next argues that the Court must dismiss this suit because the Eleventh Amendment and "related notions of sovereign immunity" (Defs' Mem. in Supp. at 5) protect an unconsenting state from suit in federal court. This argument ignores well-established precedent and misinterprets recent Supreme Court decisions.

The Eleventh Amendment provides that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign state." Read broadly, the amendment "effectively immunizes the actions of state governments from federal court review, even when a state violates the most fundamental rights." Erwin Chemerinski, Federal Jurisdiction § 7.1 at 368 (2d ed. 1994). Ever since the Supreme Court's landmark decision in *Ex Parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908), however, it has been understood that a suit in federal court to enjoin a state officer from enforcing an unconstitutional statute is not a suit against the state for purposes of the Eleventh Amendment. An officer seeking to enforce an unconstitutional enactment, the Court explained, "comes into conflict with the superior authority of that Constitution, and he is . . . stripped of his official or representative character and is subjected

11/30/01 FRI 17:58 FAX 202 341 8712 COCKLE PRINTING 011

in his person to the consequences of his individual conduct." *Id.* at 159-60.

As has been widely noted, the *Ex Parte Young* doctrine rests upon a somewhat "fictional" distinction between the state and its officers. Chemerinski, *supra*, at 392. Nevertheless, "it serves as an effective mechanism for providing relief against unconstitutional conduct by state officers and for testing, in federal courts, the constitutionality of the state statutes under which they act." Wright, Miller & Cooper, 13 Federal Practice and Procedure: Jurisdiction 2d § 3524 at 154 (2d ed. 1984). It also allows a person to contest the validity of a state law by initiating a suit rather than waiting for an enforcement proceeding to be brought and raising the Constitution or other federal law as a defense. Thus, notwithstanding the doctrine's theoretical difficulties, both the Supreme Court and the Fourth Circuit consistently have relied upon it to maintain federal jurisdiction over cases challenging the enforcement of allegedly invalid state laws.[4]

---

[4] *See, e.g., Morales v. Trans World Airlines*, 504 U.S. 374, 381, 112 S. Ct. 2031, 2035, 119 L. Ed. 2d 157 (1992) (suit to prevent attorney general from enforcing standards governing airline fare advertising on ground that standards were preempted by federal Airline Deregulation Act), *Shaw v. Delta Air Lines*, 463 U.S. 85, 96 n.14, 103 S. Ct. 2890, 2899 n.14, 77 L. Ed. 2d 490 (1983) (suit to enjoin enforcement of state laws pre-empted by ERISA) (citing *Ex Parte Young* for proposition that "it is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights"); *CSX Transportation v. Board of Public Works*, 138 F.3d 537, 541 (4th Cir. 1998) ("An injunction against the future collection of the illegal taxes, even those that already have been assessed, is prospective, and therefore available under the *Ex Parte Young*

11/30/01 FRI 17:58 FAX 402 311 8712 COCKLE PRINTING 012

Notwithstanding this precedent, the Commonwealth urges the Court to depart from *Ex Parte Young*. In its view, the doctrine has been severely undermined by the Supreme Court's recent decisions in *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996), *Idaho v. Coeur d' Alene Tribe*, 521 U.S. 261, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997), *Alden v. Maine*, 144 L. Ed. 2d 636, 527 U.S. 706, 119 S. Ct. 2240 (1999), *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 144 L. Ed. 2d 605, ___ U.S. ___, 119 S. Ct. 2219 (1999), and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 144 L. Ed. 2d 575, 527 U.S. 627, 119 S. Ct. 2199 (1999). Those cases do not bear the weight that the Commonwealth seeks to place on them. To be sure, these decisions have breathed new life into the Eleventh Amendment, and, in a couple unique circumstances, have explicitly limited the application of *Ex Parte Young*.[5]

---

doctrine."); *Virginia Hospital Association v. Baliles*, 868 F.2d 653, 662 (4th Cir. 1989) (suit against officials to enjoin state's Medicaid reimbursement procedures not barred by Eleventh Amendment; "[a] suit against Virginia officials for actions done in obedience to Commonwealth law naturally interests the Commonwealth, but is just the sort of action *Ex Parte Young* authorized.")

[5] In *Seminole Tribe*, the Court held that the Indian Commerce Clause of the Constitution does not give Congress the power to abrogate a state's immunity under the *Eleventh Amendment*. 517 U.S. at 72, 116 S. Ct. 1131-32. It further held that, in light of the "intricate remedial scheme" created by the Indian Gaming Regulatory Act, an Indian tribe may not seek to enforce its rights under the Act through a traditional *Ex Parte Young* action. *Id.* at 73-76, 116 S. Ct. at 1132-33. In *Coeur d'Alene Tribe*, the Court held that an action against state officials alleging ownership of certain lands was, in reality, a quiet title action

11/30/01 FRI 17:36 FAX 202 311 8712 COCKLE PRINTING 013

Nowhere, however, has the Court suggested that *Ex Parte Young* is in jeopardy. To the contrary, it has repeatedly indicated that the doctrine remains sound. *See, e.g., Seminole Tribe*, 517 U.S. at 71 n.14, 116 S. Ct. at 1131 n.14 (citing *Ex Parte Young* for proposition that "an individual can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law"); *Coeur d' Alene Tribe*, 521 U.S. at 268, 117 S. Ct. at 2034 ("We do not, then, question the continuing vitality of the *Ex Parte Young* doctrine.") (principal opinion); *Alden*, 119 S. Ct. at 2263 (*Ex Parte Young* doctrine "is based in part on the premise that . . . certain suits for declaratory or injunctive relief against state officers must . . . be permitted if the Constitution is to remain the supreme law of the land"). Since this case fits comfortably under the *Ex Parte Young* exception, the Court rejects the Commonwealth's sovereign immunity defense.[6]

---

against the state implicating "special sovereignty interests." 521 U.S. at 281-82, 117 S. Ct. at 2040. "Under these particular and special circumstances," the Court declared, "we find the [*Ex Parte*] *Young* exception inapplicable." *Id.* 287, 117 S. Ct. at 2043. In *Alden*, the Court held that Congress lacks the power under Article I to abrogate a state's immunity from suit in its own courts. 119 S. Ct. 2240 at 2266. In the *Florida Prepaid Postsecondary* cases, the Court held that the Fourteenth Amendment does not give Congress the power to subject states to patent infringement and false advertising suits in federal court. 119 S. Ct. at 2205, 2224-25.

[6] In a footnote, the Commonwealth contends that, even if sovereign immunity does not bar this suit Governor Gilmore should be dismissed because he is not a proper party. (Defs' Mem. in Supp. at 9. n.4.) To be subject to suit under *Ex Parte Young*, a state officer must have "some connection with the enforcement of the [allegedly unconstitutional] act." 209 U.S. at

11/30/01 FRI 17:59 FAX 102 341 8712 COCKLE PRINTING 014

C. Plantiffs Commerce Clause Challenge.

Plaintiffs have alleged that each of the statutes at issue violates the Commerce Clause of the Constitution.[7] (Waste Management Complaint, Counts I, III, VII, and XI; Brunswick Complaint, Counts I, II, IV). The Commonwealth moves the Court to dismiss these claims on two grounds. First, renewing an argument it made in response to Plaintiffs' Motion for a Preliminary Injunction, it argues that Congress has expressly authorized states to interfere with interstate commerce in municipal solid waste through Subtitle D of the Resource Conservation and Recovery Act ("RCRA"). Second, it contends that the statutes at issue fall within the "market participant" exception to the Commerce Clause. Both arguments lack merit.

Turning first to the Commonwealth's RCRA argument, as the Court previously acknowledged, it is well-

---

157. As the Commonwealth points out, many courts have held that a generalized duty to enforce state law is insufficient. *Children's Healthcare Is a Legal Duty v. Deters*, 92 F.3d 1412, 1416 (6th Cir. 1996) (citing cases); *Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992). Governor Gilmore, however, has actively and publicly defended the legislation at issue. He is therefore a proper defendant.

[7] The Commerce Clause grants Congress "the Power . . . to regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. Although it is phrased as a delegation of power to Congress, it "has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden" the free flow of commerce across state lines. *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality*, 511 U.S. 93, 98, 114 S. Ct. 1345, 1349, 128 L. Ed. 2d 13 (1994).

11/30/01 FRI 17:59 FAX 202 341 8712 COCKLE PRINTING 015

established that Congress may permit states to discriminate against interstate commerce and thereby validate what otherwise would be unconstitutional state action. "In order for a state law to be removed from the reach of the dormant Commerce Clause, however, congressional intent to authorize the discriminating law must be either 'unmistakably clear' or 'expressly stated.' " *Environmental Technology Council v. Sierra Club*, 98 F.3d 774, 782 (4th Cir. 1996) (citing cases). The isolated bits of legislative history and broadly worded statutory language on which the Commonwealth relies do not come close to expressing an "unmistakably clear" intent on the part of Congress to exempt state laws relating to solid waste from the limitations of the dormant Commerce Clause.[8]

The Commonwealth's market participation argument is equally ill-founded. Under the market participation exception, a state is exempt from dormant commerce clause restrictions where it is participating in the market like a private buyer or seller, as opposed to regulating the market "in its distinctive governmental capacity." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 277, 108 S. Ct. 1803, 1809, 100 L. Ed. 2d 302 (1988); accord *Smith Setzer v. South Carolina Procurement Review Panel*, 20 F.3d 1311, 1318 (4th Cir. 1994). Thus, for example, when a State

---

[8] The Commonwealth's suggestion that the Court has given only "cursory" consideration to this issue (Defs' Mem. in Supp. at 13) is not well-taken. The Court has thoroughly considered the evidence of Congress' alleged intent offered by the Commonwealth. Like Justice O'Connor in *C&A Carbone*, 511 U.S. 383, 408-10, 114 S. Ct. 1677, 1691-92, 128 L. Ed. 2d 399 (1994), however, it simply finds the evidence insufficient to satisfy the exacting standard established by the Supreme Court.

11/30/01 FRI 17:59 FAX 402 311 9712 COCKLE PRINTING 018

manufactures and sells cement, *Reeves, Inc. v. Stake*, 447 U.S. 429, 100 S. Ct. 2271, 65 L. Ed. 2d 244 (1980), or enters the market for abandoned automobiles, *Hughes v. Alexandria Scrap Corp.* 426 U.S. 794, 96 S. Ct. 2488, 49 L. Ed. 2d 220 (1976), it may "favor its own citizens over others" without running afoul of the Commerce Clause. *Id.* at 810, 96 S. Ct. at 2498. For the exception to apply, however, the state's participation in the market must be "direct." *White v. Massachusetts Council of Const. Employers*, 460 U.S. 204, 208, 103 S. Ct. 1042, 1044-45, 75 L. Ed. 2d 1 (1983).

The Commonwealth's argument that the market participant exception applies to this case requires little discussion. Virginia is not acting like a private participant in the waste disposal market. It is attempting to regulate the conduct of others in that market as only a state, as state, can do. The market participant doctrine therefore offers it no protection.

D. Plaintiffs' Contract Clause Claims.

Plaintiffs assert in their Complaints that the challenged statutes violate the Contract Clause of the Constitution[9] in that they impair various contracts, such as the host agreements between Waste Management and the counties in which its regional landfills are located. (Waste Management Complaint, Counts II, IV, VIII; Brunswick Complaint, Count VI.) Apparently in an effort to obtain attorneys' fees under 42 U.S.C. § 1988, they have further

---

[9] Under the Contract Clause, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art I, § 10, cl. 1.

11/30/01 FRI 17:59 FAX 402 341 8712 COCKLE PRINTING 017

alleged that the laws "deprive plaintiffs of rights secured by the Constitution and laws of the United States in violation of 42 U.S.C. § 1983."[10] The Commonwealth contends that Plaintiffs' Contract Clause claims must be dismissed in whole or in part because (1) § 1983 does not provide a remedy for violations of the Contract Clause; (2) Plaintiffs have failed to allege a violation of the Contract Clause; (3) the challenged legislation constitutes a legitimate exercise of Virginia's police power; and (4) the Contract Clause does not protect against the impairment of future contracts. The Court agrees that the Contract Clause does not apply under the facts alleged here and therefore dismisses these claims.

As the Supreme Court observed in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241, 98 S. Ct. 2716, 2720, 57 L. Ed. 2d 727 (1978), the Contract Clause "was perhaps the strongest single constitutional check on state legislation during our early years as a Nation," but "receded into comparative desuetude with the adoption of the Fourteenth Amendment." 438 U.S. at 241, 98 S. Ct. at 2720. Since the late 1970s, however, it has been invoked with increasing frequency. Unfortunately, the cases sometimes analyze Contract Clause claims in potentially misleading terms.

The Fourth Circuit has identified a three-part analysis for "harmonizing" the dictates of the Contract Clause with the regulatory power of the states. *Baltimore Teachers*

---

[10] Section 1983 imposes civil liability upon any one who, under color of state law, deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws."

11/30/01 FRI 18:00 FAX 402 311 6712 COCKLE PRINTING 018

Union v. Mayor and City Council of Baltimore, 6 F.3d 1012, 1015 (4th Cir. 1993). First, there must have been "impairment of a contract." *Id.* Second, the impairment must be substantial, which will depend on several factors. *City of Charleston v. Public Service Commission of West Virginia*, 57 F.3d 385, 392-93 (4th Cir. 1995). Finally, if the impairment is substantial, "it must be determined whether that impairment is nonetheless permissible as a legitimate exercise of the state's sovereign powers." *Baltimore Teachers Union*, 6 F.3d at 1015.

The problem with this analysis is that the first step risks confusing the impairment of a contract with the impairment of its "obligation," which is all that the Contract Clause forbids. *Ogden v. Saunders*, 25 U.S. 213, 256, 6 L. Ed. 606 (1827) ("The error of those who controvert the constitutionality, of the bankrupt law under consideration . . has arisen from not distinguishing accurately between a law which impairs a contract, and one which impairs its obligation.") Those courts that have parsed the phrase "obligation of contracts" consistently have held that it refers not to the general benefit that a private party hopes to derive from a contract but to "the means which, at the time of its creation, the law affords for its enforcement." *Nelson v. Police Jury of the Parish of St. Martin*, 111 U.S. 716, 720, 28 L. Ed. 574, 4 S. Ct. 648 (1884); *see also Metropolitan St. Louis Sewer Dist. v. Ruckelshaus*, 590 F. Supp. 385, 389 (E.D. Mo. 1984) ("A law is not impermissible merely because an object of the regulation is a party to some contracts. . . A preliminary question under the contract clause is whether the legislative action impaired or changed a specific contractual obligation."); *Northwestern Natl. Life Insur. Co. v. Jordan*, 447 F. Supp.

11/30/01 FRI 18:00 FAX 402 311 8712 COCKLE PRINTING 019

856, 859 (D. Nev. 1978) ("The obligation of a contract is defined as the law or duty which binds the parties to perform their agreements. . . . "); *McNee v. Wall*, 13 F. Supp. 326, 328 (S.D. Fla. 1935) ("The obligation of a contract is the means provided by law for the enforcement of it.") Thus, the "obligation of contracts" is "impaired" for the purposes of the Contract Clause when a law "materially changes [a contract's] binding force," *id.*, or "deprive[s] the holder of the contract all adequate and efficacious remedy." *Nelson*, 111 U.S. at 721.

Not surprisingly, then, the Supreme Court has invoked the Contract Clause only to strike down statutes that, rather than creating a "generally applicable rule of conduct," are "limited in effect to contractual obligations and remedies." *Exxon Corp. v. Eagerton*, 462 U.S. 176 at 191, 103 S. Ct. 2296 at 2306, 76 L. Ed. 2d 497. In *United States Trust Co. v. New Jersey*, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977), the Court invalidated New York and New Jersey laws that retroactively repealed a covenant that the states had entered into with the holders of certain bonds. Likewise, in *Allied Structual Steel, supra*, the Court held that the Contract Clause forbid the application of a Minnesota pension benefits law to an employer that had closed its offices just after the law became effective because the law retroactively altered the employer's contractual obligations to its employees. *See* also *Worthen Co. v. Kavanaugh*, 295 U.S. 56, 55 S. Ct. 555, 79 L. Ed. 1298 (1935) (striking down law limiting remedies available to mortgagees).

In this case, Plaintiffs allege the impairment of several contracts. First, they allege that the tonnage cap impairs the host agreements between Waste Management

11/30/01 FRI 18:00 FAX 102 3[illegible] 5712 COCKLE PRINTING 020

and its host communities, including co-plaintiff Charles City County, and between Brunswick and Brunswick County in that it will prevent the regional landfills from accepting waste in the levels anticipated and "necessary to recover the costs of constructing the landfill[s] and to operate the landfill[s] cost-effectively." (Waste Management Complaint P 80; Brunswick Complaint P 107.) Second, they allege that the cap will impair the contracts between Waste Management and its customers because the prices in these contracts were based on the assumption that Waste Management would be able to utilize the capacity of its regional landfills without limitation. (Waste Management Complaint P 82.) Third, they allege that the barging restrictions[11] will impair the contract between Waste Management and co-plaintiff Weanack,[12] because they will prevent the parties from deriving the anticipated benefits of that contract. (Waste Management Complaint PP 97, 101, 128.) None of these allegations describe an impairment of the "obligation of contracts." Rather, they merely suggest that the statutes at issue will make those contracts less profitable than expected or make performance less desirable, or even impossible. As

---

[11] As discussed in the Court's Memorandum Opinion on Plaintiffs' Motion for a Preliminary Injunction, the barging restrictions include: (1) a ban on all containerized solid waste barging until the Virginia Waste Management Board promulgates new regulations; (2) a requirement that the new regulations forbid the stacking of waste containers more than two high; and (3) a total ban on the use of solid waste barges on the James, Rappahannock, and York rivers.

[12] Weanack owns a facility for off-loading containerized solid waste from barges on the James River. Waste Management operates the facility under its contract with Weanack.

11/30/01 FRI 18:01 FAX 102 311 8712 COCKLE PRINTING 021

the district court observed in *Metropolitan St. Louis Sewer District, supra,* such "interference" with contractual expectations does not amount to an "impairment of obligations" within the meaning of the Contract Clause, for it does not alter the parties' rights and duties vis a vis each other. 590 F. Supp. at 389. The Court therefore dismisses Counts II, IV, and VIII of the Waste Management Complaint and Count VI of the Brunswick Complaint.

E. Plaintiffs' Supremacy Clause Claims.

Plaintiffs allege that the barging restrictions are preempted by federal law and are therefore void under the Supremacy Clause of the Constitution.[13] (Waste Management Complaint, Counts V and IX; Brunswick Complaint, Count III.) As with their other claims, the Waste Management plaintiffs seek relief under 42 U.S.C. § 1983.[14] The Commonwealth argues that § 1983 does not provide a remedy for the alleged Supremacy Clause violation. The Court disagrees. In any event, even if § 1983 did not provide a remedy, dismissal would be inappropriate.

---

[13] The Supremacy Clause provides that the "Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2.

[14] Brunswick has not sought relief for the alleged Supremacy Clause violation under § 1983.

11/30/01 FRI 18:01 FAX 402 341 8712 COCKLE PRINTING 022

Section 1983 does not create any substantive rights.[15] Rather, it provides a remedy for the violation of rights that are defined elsewhere, either in the Constitution or in federal statute. *Young v. City of Killeen*, 775 F.2d 1349, 1352 (5th Cir. 1985). The issue here, then, is whether the violations alleged by Plaintiffs give rise to the § 1983 remedy. The Supreme Court has made clear that "the Supremacy Clause, of its own force, does not create any rights enforceable under § 1983." *Golden State Transit v. City of Los Angeles*, 493 U.S. 103, 107, 110 S. Ct. 444, 449, 107 L. Ed. 2d 420 (1989). Rather, the § 1983 remedy will be available for a violation of a federal statute only if the statute itself "gives rise to a federal right." *Blessing v. Freestone*, 520 U.S. 329, 340, 117 S. Ct. 1353, 1359, 137 L. Ed. 2d 569 (1997). Three factors are relevant to determining whether a federal statute creates a right enforceable under § 1983. "First, Congress must have intended that the provision in question benefit the plaintiff." *Id.* Second, the asserted right must not be "so vague and amorphous that its enforcement would strain judicial competence." *Id.* (internal quotation marks and citations omitted). Finally, the statutory provision "must unambiguously impose a binding obligation on the States. In other words, [it] must be couched in mandatory rather than precatory terms." *Id.* As a general matter, a plaintiff seeking relief under § 1983 must identify the statutory provision on which he relies "with particularity," for "only when the complaint is broken down into manageable analytic bites" can a court determine whether the

---

[15] It is therefore improper to allege, as Plaintiffs do, that a defendant has "violated" § 1983.

plaintiff's claims satisfy the three criteria set forth above. *Id.* at 342, 117 S. Ct. at 1360.

In their response to the Commonwealth's motion, Plaintiffs indicate that their preemption claim principally relies on the federal documentation provisions governing the use of vessels in the "coastwise trade." *See* 46 U.S.C. § 12103 (describing prerequisites for issuance of a "certificate of documentation") and § 12106 (describing criteria for endorsing a certificate of documentation with a "coastwise endorsement"). The Supreme Court has held that a federal license confers upon the licensee a "right" to operate freely in each state's waters, subject only to legitimate exercises of the state's police power. *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 281, 97 S. Ct. 1740, 1750, 52 L. Ed. 2d 304 (1977) (striking down Virginia statutes prohibiting federally licensed vessels owned by nonresidents from fishing in the Chesapeake Bay and prohibiting ships owned by nonresidents from catching fish anywhere in the Commonwealth) (citing *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat. 1, 213-14, 6 L. Ed. 23 (1823)). Thus, it seems evident that the provisions in question were intended to benefit plaintiff Hale Intermodal Marine Company, whose barges are federally licensed to engage in the coastwise trade. Furthermore, the right articulated by the Supreme Court in *Douglas* is hardly "vague" or "amorphous." The Commonwealth contends, however, that Plaintiffs' § 1983 claim must fail because the statute does not explicitly impose any obligation on the states. The Supreme Court rejected an identical argument in *Golden State Transit, supra*, in which it held that the National Labor Relations Act gives employers rights

11/30/01 FRI 18:01 FAX 402 311 6712 COCKLE PRINTING 023

against state interference, which rights are enforceable under § 1983:

> The city's contrary argument, that the NLRA does not secure rights against the State because the duties of the State are not expressly set forth in the text of the statute, is not persuasive. We have held, based on the language, structure, and history of the NLRA, that the Act protects certain rights of labor and management against governmental interference. While it is true that [this rule] is not set forth in the specific text of an enumerated section of the NLRA, that might well also be said with respect to any number of rights or obligations that we have found implicit in a statute's language. . . . The violation of a federal right that has been found to be implicit in a statute's language and structure is as much a "direct violation" of a right as is the violation of a right that is clearly set forth in the text of the statute

Golden State Transit, 493 U.S. at 111-112, 110 S. Ct. at 451. The Court therefore denies the Commonwealth's motion to dismiss Plaintiffs' § 1983 claim insofar as it asserts rights under the federal licensing statutes.[16]

---

[16] Even if the Court were to accept the Commonwealth's position that Plaintiffs have asserted no rights enforceable under § 1983, complete dismissal of their Supremacy Clause claims would be inappropriate, because a plaintiff seeking injunctive relief against state regulation may base federal jurisdiction upon the Supremacy Clause itself. *Shaw v. Delta Airlines*, *supra*, 463 U.S. at 96 n.14, 103 S. Ct. at 2899 n.14.

11/30/01 FRI 18:02 FAX 402 341 6712 COCKLE PRINTING 021

F. Plaintiffs' Equal Protection Claims.

Plaintiffs also claim that the barging restrictions and a restriction on the transportation of municipal solid waste by truck violate the Equal Protection Clause of the Fourteenth Amendment. (Waste Management Complaint, Counts VI and X; Brunswick Complaint, Count V.) The Commonwealth contends that these claims must be dismissed because Plaintiffs have failed to allege facts sufficient to show that the statutes at issue lack a "rational basis." In light of the low level of scrutiny to which these statutes are subject under the Equal Protection Clause, Plaintiffs' odds of success on these claims are not favorable. Nonetheless, they are entitled to proceed forward. As discussed above, dismissal for failure to state a claim is proper only if the Plaintiff could not recover under any set of facts that could be proven in support of the allegations of the complaint. Since it is possible that, in the course of discovery, Plaintiffs may assemble additional evidence in support of their equal protection claims, the Court declines to dismiss those claims at this time.

G. Charles City County's Standing to Sue.

The Commonwealth also argues that the Court should dismiss Charles City County ("the County") as a plaintiff because it lacks standing to sue. The Court declines to address this issue since it is clear that each of the other plaintiffs have standing to raise the claims alleged. *Carey v. Population Services International*, 431 U.S. 678, 682, 97 S. Ct. 2010, 2014, 52 L. Ed. 2d 675 (1977) ("We conclude that appellee Population Planning Assistance

11/30/01 FRI 18:02 FAX 402 341 8712 COCKLE PRINTING 025

has the requisite standing and therefore have no occasion to decide the standing of the other appellees.")

IV. CONCLUSION

In conclusion, for the reasons stated above, the Court will dismiss Counts II, IV, and VIII of the Waste Management Complaint and Count VI of the Brunswick Complaint. In all other respects, the Motion to Dismiss is DENIED.

Let the Clerk send a copy of this Memorandum Opinion to all counsel of record.

James R. Spencer

UNITED STATES DISTRICT JUDGE

August 30, 1999

DATE

11/30/01 FRI 18:02 FAX 402 341 8712 COCKLE PRINTING 026

Civil Action Number 3:99CV425

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

WASTE MANAGEMENT HOLDINGS, ET AL, Plaintiffs, v. JAMES S. GILMORE, acting in his official capacity as the Governor of the Commonwealth of Virginia, ET AL, Defendants.

87 F. Supp. 2d 536; 2000 U.S. Dist. LEXIS 1056; 30 ELR 20334

February 2, 2000, Decided
February 2, 2000, Filed

DISPOSITION: Virginia's Motion for Partial Summary Judgment DENIED, Plaintiffs' Motion for Summary Judgment GRANTED

COUNSEL: For WASTE MANAGEMENT HOLDINGS, INC., plaintiff: Robert Lawrence Bronston, Mayer, Brown & Platt, Washington, DC. Kenneth S. Geller, Evan M. Tager, Mayer, Brown & Platt, Washington, DC.

For HALE INTERMODAL MARINE COMPANY, plaintiff: Shawn Alan Copeland, Hunton & Williams, Richmond, VA. John Early Holloway, Hunton & Williams, Norfolk, VA.

For WEANACK LAND LIMITED PARTNERS, plaintiff: Anthony F. Troy, Mays & Valentine, Richmond, VA. James S. Crockett, Jr., Mays & Valentine, Richmond, VA.

For CHARLES CITY COUNTY, plaintiff: B. Randolph Boyd, Randolph, Boyd, Cherry & Vaughn, Richmond, VA.

For BRUNSWICK WASTE MANAGEMENT FACILITY, L.L.C., consolidated plaintiff: Shawn Alan Copeland,

11/30/01 FRI 18:02 FAX 202 341 8712 COCKLE PRINTING 027

Hunton & Williams, Richmond, VA. David Alan Rudlin, Hunton & Williams, Richmond, VA. Timothy George Hayes, Hunton & Williams, Richmond, VA. Meade Addison Spotts, Spotts, Smith, Fain & Rawls, Richmond, VA. Jason S. Thomas, Hunton & Williams, Raleigh, NC.

For JAMES S. GILMORE, III, JOHN PAUL WOODLEY, JR., DENNIS TREACY, JR., defendants: Deborah Love Feild, Office Of The Attorney General, Richmond, VA. Ellen Firsching Brown, Attorney General of Virginia, Richmond, VA. Stewart Todd Leeth, Assistant Attorney General, Richmond, VA. William Eugene Thro, Newport News, VA.

GLEN BESA movant, Pro se, Richmond, Va.

For CAMPAIGN VIRGINIA, movant: David Sanburg Bailey, Beaverdam, VA.

For JOHN H. HAGER, EMILY COURIC, MARGARET WHIPPLE, BRUCE JAMERSON, MARK A MINER, LILA YOUNG, movants: Clayton Lewis Walton, Williams, Mullen, Clark & Dobbins, Richmond, VA.

Barbara Joan Gaden, Barbara J. Gaden, LLC, Richmond, VA. Stewart Todd Leeth, Assistant Attorney General, Richmond, VA.

For THE NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, amicus: Meade Addison Spotts, Spotts, Smith, Fain & Rawls, Richmond, VA. Hugh McCoy Fain, III, Spotts, Smith, Fain & Buis, Richmond, VA.

For BFI WASTE SYSTEMS OF NORTH AMERICA, INC., amicus: Meade Addison Spotts, Spotts, Smith, Fain & Rawls, Richmond, VA. Hugh McCoy Fain, III, Spotts,

11/30/01 FRI 18:02 FAX 402 341 8712 COCKLE PRINTING 028

Smith, Fain & Buis, Richmond, VA. John H. Turner, BFI Waste Systems of North America, Inc., Houston, TX.

JUDGES: James R. Spencer, UNITED STATES DISTRICT JUDGE.

OPINION BY: James R. Spencer

OPINION: MEMORANDUM OPINION

THIS MATTER is before the Court on a Motion for Partial Summary Judgment brought by Defendants JAMES S. GILMORE, ET AL (herein collectively "Virginia") and a Motion for Summary Judgment brought by Plaintiffs WASTE MANAGEMENT HOLDINGS, ET AL (herein collectively "Plaintiffs"). For the reasons stated below.

1. Virginia's Motion for Partial Summary Judgment is DENIED.

2. Plaintiffs' Motion for Summary Judgment is GRANTED.

I. Background

This case arises from the enactment of several state statutes that purport to curtail the importation of municipal solid waste (herein "MSW") into Virginia. These statutes have been challenged by five plaintiffs (herein collectively "Plaintiffs"): (1) Waste Management Holdings, Inc. (herein "Waste Management"), whose affiliates operate several large landfills in Virginia that accept substantial quantities of out-of-state MSW; (2) Weanack Land Limited Partners (herein "Weanack"), which owns a transfer facility on the James River where containerized

11/30/01 FRI 18:03 FAX 402 341 8712 COCKLE PRINTING 029

shipments of MSW are offloaded from barges and onto tractor trailers; (3) Hale Intermodal Marine Company (herein "Hale"), a barging company that transports, among other things, containerized MSW; (4) Charles City County, which owns property that it leases to Waste Management for use as a landfill; and (5) Brunswick Waste Management Facility, L.L.C. (herein "Brunswick"), which owns and operates a large landfill in Brunswick County, Virginia. The defendants are James S. Gilmore, III, in his official capacity as Governor of the Commonwealth; John Woodley, in his official capacity as Secretary of Natural Resources; and Dennis Treacy, in his official capacity as Director of the Virginia Department of Environmental Quality (herein collectively "Virginia.").

Plaintiffs contend that the disputed statutes violate the Commerce, Contracts, Supremacy, and Equal Protection Clauses of the United States Constitution, although only the Commerce and Supremacy Clauses are asserted in these particular motions. Plaintiffs maintain that these statutes were adopted by Virginia in response to reports that major importers and handlers of MSW planned to increase the daily amount of MSW flowing into Virginia landfills. Plaintiffs therefore characterize these statutes as blatant, unconstitutional attempts to hinder interstate commerce by placing importers and handlers of out-of-state MSW at an extreme disadvantage in relation to importers and handlers of Virginia-generated MSW. Virginia counters that these statutes were adopted as a legitimate exercise of its police powers, for the protection of

11/30/01 FRI 18:03 FAX 402 341 8712 COCKLE PRINTING 030

public health and to conserve Virginia resources (including landfill space).[1]

A. MSW in Virginia

The Virginia Department of Environmental Quality (herein the "DEQ") reports that as of November 1998, there were 70 active landfills in Virginia that accepted MSW. (Waste Management App. to Reb. Mem. 2 at 23.) Although the parties disagree over how many of those landfills accept MSW from other states, this much is clear: Seven "regional" landfills account for 97% of the out-of-state waste deposited in Virginia. Approximately 61 "local" landfills accept no out-of-state waste at all. The regional landfills, which are privately operated and have substantially greater disposal capacity than their local counterparts, have been sited and constructed over the past decade in order to comply with strict state and federal regulations.[2] Pursuant to a "host agreement" with the county in which it is located, each regional landfill pays the host county a fee based upon the volume of waste (excluding the host's waste) deposited at that

[1] While the parties disagree sharply over the danger to persons and to the environment posed by the importation of MSW into Virginia, the true extent of this danger is not dispositive as to the constitutional issues invoked here. Questions of comparative hazard and risk assessment are therefore not discussed.

[2] Many of Virginia's local landfills could not comply with those regulations at the time they were enacted.

11/30/01 FRI 18:03 FAX 402 341 8712 COCKLE PRINTING 031

location.[3] These agreements also require the regional landfills to perform certain services for their host communities, such as providing free waste disposal and recycling services and/or funding the closing of any local landfills which do not meet state and federal regulations. The construction of these regional landfills has required tens of millions of dollars in private investment, and the landfills face high operation and maintenance costs in addition to the sizable "host fees." To meet their revenue needs and remain economically viable, each regional landfill relies heavily on the disposal of out-of-state MSW. (Wilson Decl. PP 7-9.) In fact, out-of-state MSW comprises 75% of the MSW accepted at the five regional landfills operated by Waste Management[4] (DEQ Report at 32) and almost 70% of the waste accepted at Brunswick's regional landfill. (Burner Aff., Brunswick Exh. 1, P 15.)

Under its host agreements, Waste Management is permitted to dispose of over 2,000 tons of MSW per day at all but one of its regional landfills; prior to the enactment of the disputed statutes, Waste Management expected to exceed that level in 1999. It further expected

---

[3] For instance, Waste Management has paid Charles City County almost $37 million in host fees over the last nine years. (Wilson Decl., Waste Management Exh. 6, P 8.)

[4] Waste Management operates the following regional landfills: the Charles City County Landfill; the King George County Landfill and Recycling Facility; the Maplewood Recycling and Waste Disposal Facility, located in Amelia County, the Middle Peninsula Landfill and Recycling Center, located in Gloucester County; and the Atlantic Waste Disposal Landfill in Sussex County. (Wilson Decl. P 5.)

11/30/01 FRI 18:03 FAX 402 341 8712 COCKLE PRINTING 032

that three of its five regional landfills would accept substantially more waste in 1999 than they had in 1998. The Charles City County Landfill, for instance, accepted approximately 2,849 tons of MSW per day in 1999, compared to less than 2,000 tons per day in 1998. (Wilson Decl. PP 11, 13-15.) Likewise, Brunswick accepted approximately 2,400 tons per day in 1998, and accepted more than 2,800 tons per day in 1999. Before the enactment of the disputed statutes, it had expected to reach 5,000 tons per day by the end of the year 2000. (Burrier Aff. PP 10-11.) By contrast, not one of the sixty-one Virginia landfills that accept only Virginia-generated MSW has ever disposed of more than 2,000 tons per day, and only one or two of those might ever be expected to reach that level in the future. (Wilson Decl. P 13.) Indeed, the DEQ has stated that "most landfills operated by local governments receive less than 100 tons per day; a few receive closer to 500 tons per day." (Waste Management Reb. Mem. to Mot. for Prelim. Inj. App. 15.)

B. Disposal of MSW Generated by New York City

For several decades, New York City has disposed of its residential MSW at the Fresh Kills Landfill in Staten Island. In 1997, New York Governor George Pataki and New York City Mayor Rudolph Giuliani announced that the Fresh Kills Landfill would cease accepting waste in December 2001. The New York City Department of Sanitation (herein "NYCDOS") therefore began to negotiate interim disposal contracts in order to phase out its dependency on the Fresh Kills Landfill. (Cekander Decl., Waste Management Exh. 2, PP 3-4). Waste Management has

11/30/01 FRI 18:01 FAX 402 311 8712 COCKLE PRINTING 033

been awarded two of those contracts, and much of the MSW handled under those two contracts has been deposited at its regional landfills in Virginia. In March 1999, it bid on a third contract, which also contemplates the disposal of New York-generated MSW in Virginia. (*Id.* PP 5, 7-8.) More significantly, Waste Management has bid on, and is a primary contender for, a twenty-year contract to dispose of all or part of 12,000 tons of residential waste per day from Manhattan, Queens, Brooklyn, and the Bronx. NYDOS's Request For Proposal expresses a preference that any waste removed under this contract be transported by barge and/or rail, rather than by truck. Waste Management's response contemplates sending 60% of the New York City residential MSW to Virginia landfills, particularly the Charles City Landfill. It also contemplates that most of this waste will be containerized and transported by barge up the James River for offloading at the James River Facility. (*Id.* PP 10-11.)

In addition to the residential waste covered by existing and pending contracts, Waste Management also removes significant quantities of commercial waste per day from New York City and surrounding communities. (Magrann Decl., Waste Management Exh. 5, P 3.) Waste Management had transported a substantial portion of this waste to Virginia landfills by tractor trailer, but in 1998 began planning to transport much of the waste by barge. In furtherance of this plan, it negotiated a contract with co-plaintiff Hale, whereby Hale would lease to Waste Management four barges for five years at a fixed price, with an option to lease an additional two barges. Each barge is capable of carrying 5,000 tons of waste in specially constructed containers that can be stacked five

11/30/01 FRI 18:04 FAX 402 341 8712 COCKLE PRINTING 034

high. Hale and Waste Management expected that barging would commence in March or April 1999, that Waste Management would transport 2,500 to 3,000 tons of MSW per day from Brooklyn to the James River Facility, and that this waste would then be unloaded and delivered to the Charles City County Landfill for disposal. (*Id.* PP 5-6.) Toward this end, Waste Management has agreed to purchase 400 American Bureau of Shipping-approved, double steel walled containers at a cost of $10,000 per container. (*Id.* P 8.) It has also invested more than $5 million in improvements at the James River facility and has guaranteed payment on two cranes for offloading containers that together are worth more than $5 million. (Wilson Decl. P 19.)

Except for the small amount of waste generated on Virginia islands (such as Tangier Island) and transported across the Chesapeake Bay, no in-state MSW is transported to Virginia landfills by water.

C. Political Reaction to Increased Importation of MSW

In June 1998, the DEQ issued a report (herein the "DEQ Report") indicating that, during the fourth quarter of 1997 alone, Virginia had imported 788,000 tons of MSW and that most of it had been disposed of in large commercial facilities. (Waste Management Reb. Mem. to Mot. for Prelim. Inj. App. 2.) Around the same time, Waste Management's plans to significantly increase its importation of New York City's MSW into Virginia began to attract greater notice. In July 1998, State Senator Bill Bolling, chief sponsor of the disputed statutes, wrote to Virginia

11/30/01 FRI 18:04 FAX 402 341 9712 COCKLE PRINTING 035

Attorney General Mark Early about the possibility of blocking those plans:

> With the impending closure of the Fresh Kills Landfill in New York, I am concerned that the pressure for additional importation will increase even more in the next few years. If it is legally possible to do, I would like to introduce legislation during the 1999 session of the General Assembly that would place restrictions on such importation.
>
> The legislation I am currently considering could take a number of forms. This legislation could seek to prohibit the importation of out-of-state waste altogether. In the alternative, I may seek to limit such importations to those landfills currently receiving out-of-state waste, and to levels reflective of their current importations. However, I do not want to propose such legislation if it would be in violation of federal or state law.

(*Id.* at App. 4.) In August 1998, the Congressional Research Service issued a report indicating that Virginia now ranked second only to Pennsylvania as the nation's largest importer of MSW, taking in 2.8 million tons in 1997. On September 30, 1998, Senator Bolling announced his intention to introduce legislation aimed at out-of-state waste importation when the General Assembly reconvened in January 1999. In support of his proposals, Senator Bolling highlighted the Commonwealth's newly acquired ranking among waste-importing states, Waste Management's recently announced contract to remove 2,400 tons of residential MSW per day from New York City, "most if not all of [which] will be transported on Virginia's waterways," and the impending closure of the

11/30/01 FRI 18:05 FAX 402 341 8712 COCKLE PRINTING 036

Fresh Kills Landfill. "New York officials have made no secret of their intent to export the 14,000 tons of garbage a day that are currently disposed of in the Fresh Kills Landfill to other states. It appears as though the vast majority of this garbage may be headed to Virginia as well," Senator Bolling warned. (*Id.* at App. 5.)

Governor Gilmore also expressed concern about the increased flow of out-of-state waste into Virginia's landfills. On September 29, 1998, he announced that he was dispatching his top environmental officials to meet with their counterparts from other states "to ensure that Virginia does not drown in a regional sea of garbage." (*Id.* at App. 4.) In November, after the DEQ Report was released, the Governor imposed a moratorium on new landfill development and instructed Secretary Woodley to recommend legislation to deal with the problem. (*Id.* at App. 5.)

In his January 13, 1999 State of the Commonwealth address, Governor Gilmore proposed such legislation. Specifically referring to Waste Management's intentions, he noted that "just two days ago, a major trash company announced plans to import four thousand more tons of New York City trash into Virginia per day." To combat this increase, he announced that he would ask the Virginia General Assembly to take the following steps: (1) to prohibit the use of barges for transporting MSW on Virginia's waterways; (2) to impose new permit requirements for landfills; (3) to cap the amount of waste that may be deposited in Virginia landfills; and (4) to increase inspections of waste being hauled by truck or other means. (*Id.* at App. 6.) When New York City Mayor Giuliani suggested that Virginia might have an obligation

11/30/01 FRI 18:05 FAX 202 341 8712 COCKLE PRINTING 037

to accept New York City's MSW, Governor Gilmore responded that "the home state of Washington, Jefferson, and Madison has no intention of becoming New York's dumping grounds." (*Id.* at App. 10.)

Meanwhile, numerous Virginia lawmakers and other state officials announced their support for Senator Bolling's and the Governor's efforts, frequently couching their positions in anti-out-of-state MSW terms. (Waste Management App. 13-18.)

D The Disputed Statutes

In March and April 1999, the General Assembly approved and Governor Gilmore signed into law a number of amendments to the Code of Virginia that would impede the importation of out-of-state MSW into the Commonwealth.

1. The Cap Provision

First, the General Assembly capped the amount of waste that any landfill may accept at either (1) 2,000 tons per day or (2) the average amount accepted by the landfill in 1998, whichever is greater. 1999 Virginia Acts chs. 580, 611 (adding § 10.1-1408.3) (herein the "cap provision"). The cap provision also authorizes the Virginia Waste Management Board to grant individual requests for exceptions if, after considering "the potential human health, environmental, transportation infrastructure, and transportation safety impacts and needs," it determines that "(I) [an exception] protects present and future human health and safety and the environment; (ii) there

11/30/01 FRI 18:05 FAX 402 341 9712 COCKLE PRINTING 038

is a need for the additional capacity; (iii) sufficient infrastructure will exist to safely handle the waste flow; (iv) the increase is consistent with the requirements of § 10.1-1408.3 [which establishes the cap]; (v) the public interest will be served by [the increase]; and (vi) the additional capacity is consistent with regional and local solid waste management plans developed to pursuant to § 10.1-1411." *Id.* (incorporating factors set out in amended version of § 10.1-1408.1(D)). In addition to these factors, the Board must also consider "other factors it deems appropriate to protect the health, safety and welfare of the people of Virginia and Virginia's environmental and natural resources." *Id.* The Board may not approve an exception from the cap "until a public hearing on the proposed increase has been held in the locality where the landfill requesting the increase is located." *Id.*

2. The Barging Restrictions

In addition to the cap provision, the General Assembly enacted two new amendments restricting the use of barges for the transport of MSW on Virginia's waterways (herein collectively the "barging restrictions").

a. The Stacking Provision

Section 10.1-1454.1(A) of the Code of Virginia, enacted in 1998, requires the Virginia Waste Management Board to promulgate regulations governing the transport of MSW by ship, barge, or other vessel, as well as the loading and unloading of such waste. Va. Code Ann. § 10.1-1454.1(A). Pursuant to the second provision challenged here, those regulations, which have yet to be

11/30/01 FRI 18:05 FAX 202 341 8712 COCKLE PRINTING 038

issued, must require now that containerized waste be stacked no more than two containers high. 1999 Virginia Acts ch. 608 (amending Va. Code § 10.1-1454.1) (herein the "stacking provision"). Under the amended version of Subsection B. "no facility shall receive wastes . . . by ship, barge, or other vessel prior to the effective date of the regulations promulgated pursuant to subsection A." *Id.* There is no deadline for the issuance of these regulations.

b. The Three-River Ban

Finally, the General Assembly added § 10.1-1454.2 to the Virginia Code. This new section prohibits "the commercial transport of hazardous or nonhazardous solid waste by ship barge or other vessel [upon the] Rappahanock, James and York Rivers, to the fullest extent consistent with limitations posed by Constitution of the United States." 1999 Virginia Acts, chs. 583, 612 (adding § 10.1-1454.2) (herein the "three-river ban").

II. Standard of Review

A motion for summary judgment lies only where "there is no genuine issue as to any material fact" and where the moving party is entitled to judgment as a matter of law. FED R. CIV. P. 56(c). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). The Court must view the facts and the inferences drawn therefrom in the light most favorable to the party opposing the motion. *Ballinger v. North Carolina Agr. Extension Serv.*, 815 F.2d 1001, 1004 (4th Cir.), *cert. denied*, 484 U.S. 897, 98 L. Ed. 2d 191, 108 S. Ct. 232 (1987). While viewing

the facts in such a manner, the Court looks to the affidavits or other specific facts to determine whether a triable issue exists. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). According to the Fourth Circuit,

> In determining whether summary judgment may be granted, the district court must perform a dual inquiry into the genuineness and materiality of any purported factual issues. Whether an issue is genuine calls for an examination of the entire record then before the court in the form of pleadings, depositions, answers to interrogatories, admissions on file and affidavits, under Rule 56(c) and (e). . . . Genuineness means that the evidence must create fair doubt; wholly speculative assertions will not publicly suffice. A trial, after all, is not an entitlement. It exists to resolve what reasonable minds would recognize as real factual disputes.

Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985) (emphasis original). Finally, summary judgment is not appropriate if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

III. Analysis

Plaintiffs' Motion for Summary Judgment addresses all of the regulations listed in Section II, whereas Virginia's Motion for Partial Summary Judgment deals only with the cap provisions; as one motion essentially subsumes the other, they shall be addressed jointly. For the reasons discussed below, Virginia's Motion for Partial

11/30/01 FRI 18:06 FAX 202 341 8712 COCKLE PRINTING 010

Summary Judgment is DENIED and the Plaintiffs' Motion for Summary Judgment is GRANTED in its entirety.

While the parties have conducted a vigorous factual debate as to the present state of waste disposal in Virginia, whether the disputed statutes may stand is ultimately a question of constitutional law. This question must be answered in favor of the Plaintiffs, in light of well-established and unequivocal precedent concerning the ability of states to affect interstate commerce. The Commerce Clause of the United States Constitution grants Congress "the Power . . . to regulate Commerce . . . among the several States." U.S. CONST. ART. I, § 8, cl. 3. Although the Commerce Clause is phrased as a delegation of power to Congress, it "has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden" the free flow of commerce across state lines. *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality*, 511 U.S. 93, 98, 114 S. Ct. 1345, 1349, 128 L. Ed. 2d 13 (1994) (internal citations omitted). This limitation on state power reflects the Framers' firm belief that in order for the new Union to succeed, it 'would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Id.* (Quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-26, 99 S. Ct. 1727, 1731, 60 L. Ed 2d 250 (1979)).

When a law appears to discriminate against out-of-state interests "facially, in its practical effect, or in its purpose," it will only survive judicial scrutiny if the defendant can show that (1) it "is demonstrably justified by a valid factor unrelated to economic protectionism"

and (2) there are "no nondiscriminatory alternatives adequate to preserve the local interests at stake." *Environmental Technology Council v. South Carolina*, 98 F.3d 774, 785 (4th Cir. 1996) (internal citations omitted). This standard has been characterized as "a virtually per se rule of invalidity," for the Supreme Court has upheld such discriminatory laws only in a few instances where the discrimination was justified by the threat of death or disease. *Id.* (citing *Maine v. Taylor*, 477 U.S. 131, 91 L. Ed. 2d 110, 106 S. Ct. 2440 (1986) (upholding Maine's prohibition on importing live baitfish because they threatened destruction of Maine's fisheries); *Clason v. Indiana*, 306 U.S. 439, 83 L. Ed. 858, 59 S. Ct. 609 (1939) (upholding Indiana's restrictions on transporting dead animals without a license)). A more forgiving standard of review applies, however, "where the statute regulates evenhandedly to effectuate a legitimate public interest, and its effects on interstate commerce are only incidental." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624, 57 L. Ed. 2d 475, 98 S. Ct. 2531 (1978) (quoting *Pike v. Bruce Church*, 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970)). Specifically, such legislation "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* This standard reflects the Court's recognition that "incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people." 437 U.S. at 623-24. As the Fourth Circuit has observed, the line between those laws that are subject to strict scrutiny (and thus are presumptively invalid) and those that are subject to the more relaxed

11/30/01 FRI 18:06 FAX 402 311 8712 COCKLE PRINTING 012

standard of review "is not clear." *Environmental Technology Council*, 98 F.3d at 785. "The crucial inquiry," however, is whether the legislation at issue "is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *City of Philadelphia*, 437 U.S. at 624.

As a preliminary matter, the statutes at issue here must be examined under strict scrutiny, because the facts introduced thus far demonstrate that these statutes discriminate facially against out-of-state interests. The Fourth Circuit made clear in its holding in *Environmental Technology Council* that strict scrutiny should be applied where states adopt policies that appear to burden interstate commerce, a finding that such polices actually do so is not required. *Environmental Technology Council*, 98 F.3d at 785. This distinction may seem to be merely semantic, but its impact is critical, both for the Court and for the parties: the Court is required to apply the two-prong test outlined in Environmental Technology Council without determining first whether the disputed statutes actually burden interstate commerce. As a consequence, Virginia's arguments as to the true burden – if any – imposed upon interstate commerce by the adoption of the disputed statutes have no bearing upon the level of scrutiny appropriate for this case. The Court could not apply the more lenient standard of review presented in *City of Philadelphia*, even if it were to accept Virginia's contention that interstate commerce would not be burdened by the disputed statutes, because Plaintiffs have demonstrated that the disputed statutes do not regulate evenhandedly on

11/30/01 FRI 16:06 FAX 402 341 8712 COCKLE PRINTING 013

their face. Indeed, Virginia appears to have adopted measures that would frustrate or preclude the importation of MSW at every turn, even if these measures might also hinder the intrastate handling of MSW. For this reason, the disputed statutes must be examined under the two-prong test outlined in *Environmental Technology Council*: Virginia must show that the statutes are (1) "demonstrably justified by a valid factor unrelated to economic protectionism." and also (2) that there are no adequate, nondiscriminatory alternatives that would protect local interests.

Regardless of whether Virginia can show that the disputed statutes are justified by a valid factor unrelated to economic protectionism (and the Court finds that doing so is truly impossible), Virginia plainly cannot demonstrate that no adequate, nondiscriminatory alternatives exist that would protect local interests just as well as the disputed statutes. Plaintiffs posit at least two perfectly reasonable alternatives that might also protect Virginia landfill capacity: (1) a cap upon the flow of MSW into all Virginia landfills, not merely the regional landfills used predominantly by out-of-state interests; and (2) an increased user fee for those who deposit MSW into all Virginia landfills, which would give all MSW handlers an economic incentive to minimize waste, not merely those MSW handlers who bring in MSW from outside of Virginia. It is not difficult to think of other alternatives; indeed, when considering the all-river ban in its ruling on Plaintiffs' Motion for Preliminary Injunction, the Court found that Virginia could likely

> address its health, safety, and environmental concerns without totally prohibiting the use of

11/30/01 FRI 18:07 FAX 402 341 8712 COCKLE PRINTING 011

> container barges for transporting solid waste. Indeed, the General Assembly approved such legislation in 1998 in the form of Va. Code § 10.1-1454.1. That section requires that solid waste transported by water be carried in containers "designed, constructed, loaded, operated, and maintained so as to prevent the escape of liquids, waste and odors and to prevent the loss or spillage of waste in the event of an accident." § 10.1-1454.1(F). It further requires the Virginia Waste Management Board to promulgate regulations along those lines. § 10.1-1454.1(A). The General Assembly acted to effectively preclude the use of container barges for transporting interstate waste, however, before the Board ever issued its regulations.

(Mem. Op. on Prelim. Inj. § III(D).). Virginia argues that Plaintiffs have offered the Court no reasonable alternatives to the disputed statutes, and thus that Plaintiffs have not satisfied the second prong under *Environmental Technology Council*. Virginia is not merely wrong on the facts, it is also wrong on the law. Plaintiffs have indeed offered some possible alternatives to the disputed statutes, all of which appear perfectly capable of reducing the flow of MSW into Virginia landfills. Plaintiffs needn't have done so, however – it is Virginia's burden to show that no such reasonable alternatives exist, and it has not done so. As Virginia has failed to satisfy the second prong under *Environmental Technology Council*, the disputed statutes cannot survive strict scrutiny; the statutes therefore unconstitutionally interfere with interstate commerce, in violation of the Commerce Clause.

Nor can Virginia show that the disputed statutes are "demonstrably justified by a valid factor unrelated to

11/30/01 FRI 18:07 FAX 402 341 8712 COCKLE PRINTING 015

economic protectionism." *Environmental Technology Council*, 98 F.3d at 785 (internal citations omitted). While Virginia offers numerous factors to justify its adoption of the disputed statute, the Court has already ruled on the relative merit of these factors and found them wanting. In its ruling on the Motion to Dismiss, the Court noted Virginia's professed need

> to preserve landfill capacity and to limit their growth at a reasonable level. The Supreme Court has squarely rejected the notion, however, that "resource protectionism" is a valid defense to a Commerce Clause challenge. *Oregon Waste Systems, supra*, 511 U.S. at 107, 114 S. Ct. at 1354 ("Even assuming that landfill space is a 'natural resource,' 'a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources within its borders.' ") (quoting *City of Philadelphia*, 437 U.S. at 627, 98 S. Ct. at 2537). The Commonwealth also contends that the laws are justified by Virginia's desire to protect the health and safety of its citizens and the environment. Although these are clearly valid policy concerns, the Supreme Court has made clear that a state may not address those concerns by discriminating against out-of-state waste. *Chemical Waste Management*, 504 U.S. 334 at 345-46, 112 S. Ct. 2009 at 2015-16, 119 L. Ed. 2d 121 ("To the extent that Alabama's concern touches environmental conservation and the health and safety of its citizens, such concern does not vary with the point of origin of the waste, and it remains within the State's power to monitor and regulate more

11/30/01 FRI 18:07 FAX 102 341 8712 COCKLE PRINTING 016

closely the transportation of all hazardous waste within its borders.")[5]

(Mem. Op. on Prelim. Inj. § III(C)(3).) The parties argue at length about the nature of Virginia's existing MSW regulations (spending considerable time on the manner in which Virginia regulates various forms of medical waste, which may or may not find its way into the waste stream) as compared to regulations found in other states, but this discussion is ultimately beside the point. Under the law, it doesn't matter whether Virginia's MSW standards (either before or after the disputed statutes were enacted) better protect the environment, public safety, or landfill resources than standards in other states. What matters is that Virginia appears to have buttressed these protections by adopting measures which unduly hinder the importation of MSW. Further, the record demonstrates that Virginia acted to staunch the importation of MSW in a knee-jerk response to reports that increased levels of out-of-state MSW would soon be flowing into the Commonwealth, which - while perhaps advantageous politically, or commendable socially - is impermissible constitutionally. The tenor of public discussion cited in Section II makes clear that Virginia was motivated by economic protectionism, and therefore any post-hoc efforts to shroud its actions in the cloak of environmental conservation and resource preservation are ineffectual. Governor Gilmore's comments are direct: Virginia did not intend to "drown in a sea of regional garbage," and it had "no

---

[5] The full citation for this case is *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 345-46, 119 L. Ed. 2d 121, 112 S. Ct. 2009 (1992).

11/30/01 FRI 18:07 FAX 402 341 8712 COCKLE PRINTING 047

intention of becoming New York's dumping grounds." Virginia cannot now assume a false mantle of neutrality towards out-of-state MSW, nor can it evade years of established precedent. Virginia therefore fails also to satisfy the first prong under *Environmental Technology Council*, and thus the disputed statutes violate the Commerce Clause.

IV. Conclusion

For these reasons, Virginia's Motion for Partial Summary Judgment is DENIED and Plaintiffs' Motion for Summary Judgment is GRANTED in its entirety.

Let the Clerk send a copy of this Memorandum Opinion to all counsel of record.

And it is SO ORDERED.

James R. Spencer

UNITED STATES DISTRICT JUDGE

February 2, 2000
DATE

FINAL ORDER

THIS MATTER is before the Court on a Motion for Partial Summary Judgment brought by Defendants JAMES S. GILMORE, ET AL (herein "Virginia") and a Motion for Summary Judgment brought by Plaintiffs WASTE MANAGEMENT HOLDINGS, ET AL (herein "Plaintiffs"). For the reasons stated in the accompanying Memorandum Opinion,

11/30/01 FRI 18:08 FAX 402 311 8712 COCKLE PRINTING 018

1. Virginia's Motion for Partial Summary Judgment is DENIED.

2. Plaintiffs' Motion for Summary Judgment is GRANTED.

Let the Clerk send a copy of this Order to all counsel of record.

And it is SO ORDERED.

James R. Spencer

UNITED STATES DISTRICT JUDGE

DATE: February 2, 2000

11/30/01 FRI 18:06 FAX 402 341 8712 COCKLE PRINTING 049

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

WASTE MANAGEMENT HOLDINGS, INC., et al., Plaintiffs, v. JAMES S. GILMORE, III, et al., Defendants.	Civil Action Number 3:99CV425

ORDER

(Filed Aug. 24, 1999)

THIS MATTER is before the Court on Plaintiffs' Motion to Strike Insufficient Defense. For the reasons stated in the accompanying Memorandum Opinion, the Court GRANTS the motion.

Let the Clerk send a copy of this Order to all counsel of record.

And it is SO ORDERED.

/s/ James R. Spencer
UNITED STATES DISTRICT JUDGE

August 24, 1999
DATE

11/30/01 FRI 18:08 FAX 402 341 8712 COCKLE PRINTING 005

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

WASTE MANAGEMENT HOLDINGS, INC., et al., Plaintiffs, v. JAMES S. GILMORE, III, et al., Defendants.	Civil Action Number 3:99CV425

MEMORANDUM OPINION

(Filed Aug. 24, 1999)

THIS MATTER is before the Court on Plaintiffs' Motion to Strike Insufficient Defense. For the reasons stated herein, the Court GRANTS the motion.

I. Background

Plaintiffs in this now-consolidated action have challenged several recently-enacted Virginia statutes that will significantly restrict the ability of Virginia's privately-owned regional landfills to import out-of-state municipal solid waste into the Commonwealth. Principally, Plaintiffs contend that the Virginia laws violate the Commerce Clause of the United States Constitution because they discriminate against the interstate flow of municipal solid

11/30/01 FRI 18:08 FAX 102 341 8712 COCKLE PRINTING 051

waste. In its Answers to the two Complaints filed, Defendants ("Virginia" or "the Commonwealth") have alleged a number of affirmative defenses, including the following, which is now subject to Plaintiffs' Motion to Strike:

> To the extent that Virginia's regulation of municipal solid waste were to be considered unconstitutional, the acts of New York City and/or New York State to discourage or prevent disposal of municipal solid waste in the City and in the State also violate the Constitution and distort interstate commerce. Accordingly, as to New York city waste:
>
> A. Virginia statutes do not violate the Constitution but merely respond to the flood of garbage produced by New York City's and New York State's own acts in violation of the Constitution and public policy in distorting interstate commerce;
>
> B. New York City, through the Plaintiffs here, comes to court with unclean hands and should be denied any relief; and
>
> C. Virginia's statutes do not cause the Plaintiffs any cognizable injury and they are entitled to no relief.
>
> Said otherwise, New York cannot refuse to dispose of its own garbage in New York and then complain that the Commonwealth attempts to regulate the disposal in Virginia.

(Answer to Complaint of Waste Management Holdings, Inc., et al. ¶ 85; Answer to Complaint of Brunswick Waste Management, L.L.C., ¶ 93).

As explained more fully in its response to the instant Motion to Strike, the Commonwealth's theory is that New

11/30/01 FRI 18:08 FAX 202 311 8712 COCKLE PRINTING 052

York State and New York City have taken affirmative steps to discourage the disposal of New York City's municipal solid waste within New York's borders. Such conduct, the Commonwealth argues, constitutes unlawful "dumping" and violates the "free trade principles" underlying the Commerce Clause in that it "forces" into interstate commerce waste that would remain in New York were the "'invisible hand' of supply and demand" permitted to operate without interference. (Defs' Resp. at 9-11.) Thus, the Commonwealth concludes, Plaintiffs' claims are barred insofar those claims arise from Plaintiffs' interest in importing New York city's municipal solid waste into Virginia.

II. Discussion

Federal Rule of Civil Procedure 12(f) permits a district court, on motion of a party, to "order stricken from any pleading any insufficient defense." As the Commonwealth points out, Rule 12(f) motions generally are viewed with disfavor "because striking a portion of a pleading is a drastic remedy and because it is often sought by the movant simply as a dilatory tactic." 5A Wright & Miller, *Federal Practice and Procedure*: Civil 2d § 1380 at 647 (2d ed. 1990). That said, "a defense that might confuse the issues in the case and would not, under the facts alleged, constitute a valid defense to the action can and should be deleted." *Id.*, § 1381 at 665. It is also appropriate for a court to strike a defense where it is "clearly legally insufficient, such as when there is no bona fide issue of fact or law." *Clark v. Milam*, 152 F.R.D. 66, 70 (S.D. W. Va. 1993). *See also FDIC v. Collins*, 920 F. Supp. 30, 33 (D. Conn. 1996) ("Where the defense is

11/30/01 FRI 18:09 FAX 202 341 8712 COCKLE PRINTING 053

insufficient as a matter of law, the defense should be stricken to eliminate the delay and unnecessary expense of litigating it at trial."); *Environ Products, Inc. v. Total Containment, Inc.*, 951 F. Supp. 57, 60 (E.D. Pa. 1996) (appropriate to strike affirmative defense where its insufficiency is "clearly apparent"). The Court finds that this is such a case.

As noted above, the Commonwealth's theory is that the "natural" laws of supply and demand dictate a particular level of interstate and intrastate commerce. Thus, where a state "deliberately" exports waste that would remain within its boundaries if "the free flow of commerce" were permitted to follow its normal course (Defs' Resp. at 7), the state violates free trade principles and, by extension, the Commerce Clause. The Commonwealth has cited no case law for this admittedly novel theory, nor could it, for the cases in this area are abundantly clear that the Commerce Claus is implicated when a state *restricts* the flow of waste across its borders, either by inhibiting the export of its own waste, *see, e.g., Carbone v. Town of Clarkstown*, 511 U.S. 383, 114 S. Ct. 1677 (1994) (invalidating local "flow control" ordinance), or by limiting the importation of waste from another jurisdiction. *See, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617, 98 S. Ct. 2531 (1978) (striking down New Jersey statute that prohibited the importation of most waste generated or collected outside of New Jersey). Not a single case has held that a state violates the Commerce Clause when, "contrary to laws of supply and demand" (Defs' Resp. at 10 n.14.), it *utilizes* the channels of interstate commerce to meet its waste disposal needs. Nor is there any reasons to suspect that the Commonwealth's theory might succeed

11/30/01 FRI 18:09 FAX 402 341 5712 COCKLE PRINTING 054

in the future. First, it rests upon the naive assumption that there exists some "natural" level of interstate commerce and that, applying the laws of supply and demand, courts can divine what that level is. Second, it flies in the face of fundamental Commerce Clause principles, for it necessarily requires a court to consider the states as a separate economic entities, each with its own level of waste supply and disposal capacity.[1] *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality*, 511 U.S. 93, 98-99, 114 S. Ct. 1345, 1349-50 (1994) (*quoting H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 537-38, 69 S. Ct. 657, 665 (1949)) ("This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, . . . has as its corollary that the states are not separable economic units.")

Even were there are some legal basis for the Commonwealth's contention that New York City and New York State have violated the Commerce Clause, its affirmative defense would be stricken. Since an affirmative defense assumes the facts alleged in the complaint to be true, the Court, in evaluating the sufficiency of the Commonwealth's affirmative defense, must assume that the challenged statutes do, in fact, discriminate against interstate commerce. A state may not escape responsibility for violating the Commerce Clause by pointing to another

---

[1] In this case, for instance, the Commonwealth would have the Court determine that in the absence of deliberate conduct by New York State and New York City, a certain amount of New York City's waste would be deposited in New York's existing landfills, rather than exported, because those landfills have excess capacity and are more convenient that out-of-state disposal sites.

11/30/01 FRI 18:09 FAX 102 341 8712 COCKLE PRINTING 055

state's violation. As the Court has remarked previously, such "tit-for-tat" protectionism is precisely the sort of thing that the Constitution's framers sought to avoid by granting Congress, and not the states, authority to regulate interstate commerce. *See also Great Atlantic and Pacific Tea Company, Inc. v. Cottrell*, 424 U.S. 366, 379-80, 96 S. Ct. 923, 932 (1976) ("[T]o the extent, if any, that Louisiana is unconstitutionally burdening the flow of [Mississippi's] milk in interstate commerce . . . , the Commerce Clause itself creates necessary reciprocity: Mississippi and its producers may pursue their constitutional remedy by suit in state or federal court challenging Louisiana's actions as violative of the Commerce Clause.")

III. CONCLUSION

In sum, for the reasons stated above the Court finds that the Commonwealth's affirmative defense could not, under the facts, constitute a valid defense to Plaintiff's suit and that its continued presence in this action would needlessly confuse the issues. Accordingly, Plaintiffs' Motion to Strike is GRANTED

Let the Clerk send a copy of this Memorandum Opinion to all counsel of record.

And it is SO ORDERED.

/s/ James R. Spencer
UNITED STATES DISTRICT JUDGE

August 24, 1999
DATE

11/30/01 FRI 18:10 FAX 402 341 8712 COCKLE PRINTING 056

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
July 2, 2001

No. 00-1185
CA-99-425
CA-99-443

WASTE MANAGEMENT HOLDINGS, INCORPORATED; HALE INTERMODAL MARINE COMPANY; WEANACK LAND LIMITED PARTNERS; CHARLES CITY COUNTY; BRUNSWICK WASTE MANAGEMENT FACILITY

Plaintiffs-Appellees

v

JAMES S. GILMORE, III, in his official capacity as Governor of the Commonwealth of Virginia; JOHN PAUL WOODLEY, JR.; in his official capacity as Secretary of Natural Resources; DENNIS TREACY, JR., in his official capacity as Director of the Virginia Department of Environmental Quality

Defendants-Appellants

GLEN BESA; CAMPAIGN VIRGINIA; JOHN H. HAGER, Honorable; EMILY COURIC, Senator; MARGARET WHIPPLE, Senator; BRUCE JAMERSON; MARK A. MILLER; LILA YOUNG

Movants

11/30/01 FRI 18:10 FAX 402 341 8712 COCKLE PRINTING 087

On Petition for Rehearing and Rehearing En Banc

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

Va. Code Ann. § 10.1-1408.1 (2001)

§ 10.1-1408.1. Permit required; open dumps prohibited

A. No person shall operate any sanitary landfill or other facility for the disposal, treatment or storage of nonhazardous solid waste without a permit from the Director

B. No application for (i) a new solid waste management facility permit or (ii) application for a permit amendment or variance allowing a category 2 landfill, as defined in this section, to expand or increase in capacity shall be complete unless it contains the following:

1. Certification from the governing body of the county, city or town in which the facility is to be located that the location and operation of the facility are consistent with all applicable ordinances. The governing body shall inform the applicant and the Department of the facility's compliance or noncompliance not more than 120 days from receipt of a request from the applicant. No such certification shall be required for the application for the renewal of a permit or transfer of a permit as authorized by regulations of the Board; noncompliance not more than 120 days from receipt of a request from the applicant. No such certification shall be required for the application for the renewal of a permit or transfer of a permit as authorized by regulations of the Board;

2. A disclosure statement, except that the Director, upon request and in his sole discretion, and when in

his judgment other information is sufficient and available, may waive the requirement for a disclosure statement for a captive industrial landfill when such a statement would not serve the purposes of this chapter;

3 If the applicant proposes to locate the facility on property not governed by any county, city or town zoning ordinance, certification from the governing body that it has held a public hearing, in accordance with the applicable provisions of § 15.2-2204, to receive public comment on the proposed facility. Such certification shall be provided to the applicant and the Department within 120 days from receipt of a request from the applicant;

4 If the applicant proposes to operate a new sanitary landfill or transfer station, a statement, including a description of the steps taken by the applicant to seek the comments of the residents of the area where the sanitary landfill or transfer station is proposed to be located, regarding the siting and operation of the proposed sanitary landfill or transfer station. The public comment steps shall be taken prior to filing with the Department the notice of intent to apply for a permit for the sanitary landfill or transfer station as required by the Department's solid waste management regulations. The public comment steps shall include publication of a public notice once a week for two consecutive weeks in a newspaper of general circulation serving the locality where the sanitary landfill or transfer station is proposed to be located and holding at least one public meeting within the locality to identify issues of concern, to facilitate communication and to establish a dialogue between the applicant and persons who may be affected by the issuance of a permit for the sanitary landfill or transfer

11/30/01 FRI 18:11 FAX 102 311 8712 COCKLE PRINTING 060

station. The public notice shall include a statement of the applicant's intent to apply for a permit to operate the proposed sanitary landfill or transfer station, the proposed sanitary landfill or transfer station site location, the date, time and location of the public meeting the applicant will hold and the name, address and telephone number of a person employed by the applicant, who can be contacted by interested persons to answer questions or receive comments on the siting and operation of the proposed sanitary landfill or transfer station. The first publication of the public notice shall be at least fourteen days prior to the public meeting date.

The provisions of this subdivision shall not apply to applicants for a permit to operate a new captive industrial landfill or a new construction-demolition-debris landfill.

5. If the applicant is a local government or public authority that proposes to operate a new municipal sanitary landfill or transfer station, a statement, including a description of the steps taken by the applicant to seek the comments of the residents of the area where the sanitary landfill or transfer station is proposed to be located, regarding the siting and operation of the proposed sanitary landfill or transfer station. The public comment steps shall be taken prior to filing with the Department the notice of intent to apply for a permit for the sanitary landfill or transfer station as required by the Department's solid waste management regulations. The public comment steps shall include the formation of a citizens' advisory group to assist the locality or public authority with the selection of a proposed site for the

11/30/01 FRI 18:11 FAX 402 341 8712 COCKLE PRINTING 061

sanitary landfill or transfer station, publication of a public notice once a week for two consecutive weeks in a newspaper of general circulation serving the locality where the sanitary landfill or transfer station is proposed to be located, and holding at least one public meeting within the locality to identify issues of concern, to facilitate communication and to establish a dialogue between the applicant and persons who may be affected by the issuance of a permit for the sanitary landfill or transfer station. The public notice shall include a statement of the applicant's intent to apply for a permit to operate the proposed sanitary landfill or transfer station, the proposed sanitary landfill or transfer station site location, the date, time and location of the public meeting the applicant will hold and the name, address and telephone number of a person employed by the applicant, who can be contacted by interested persons to answer questions or receive comments on the siting and operation of the proposed sanitary landfill or transfer station. The first publication of the public notice shall be at least fourteen days prior to the public meeting date. For local governments that have zoning ordinances, such public comment steps as required under §§ 15.2-2204 and 15.2-2285 shall satisfy the public comment requirements for public hearings and public notice as required under this section. Any applicant which is a local government or public authority that proposes to operate a new transfer station on land where a municipal sanitary landfill is already located shall be exempt from the public comment requirements for public hearing and public notice otherwise required under this section;

12/30/01 FRI 18:11 FAX 402 341 8712 COCKLE PRINTING 006

6. If the application is for a new municipal solid waste landfill or for an expansion of an existing municipal solid waste landfill, a statement, signed by the applicant, guaranteeing that sufficient disposal capacity will be available in the facility to enable localities within the Commonwealth to comply with solid waste management plans developed pursuant to § 10.1-1411, and certifying that such localities will be allowed to contract for and to reserve disposal capacity in the facility. This provision shall not apply to permit applications from one or more political subdivisions for new landfills or expanded landfills that will only accept municipal solid waste generated within those political subdivisions' jurisdiction or municipal solid waste generated within other political subdivisions pursuant to an interjurisdictional agreement;

7. If the application is for a new municipal solid waste landfill or for an expansion of an existing municipal solid waste landfill, certification from the governing body of the locality in which the facility would be located that a host agreement has been reached between the applicant and the governing body unless the governing body or a public service authority of which the governing body is a member would be the owner and operator of the landfill. The agreement shall, at a minimum, have provisions covering (i) the amount of financial compensation the applicant will provide the host locality, (ii) daily travel routes and traffic volumes, (iii) the daily disposal limit, and (iv) the anticipated service area of the facility. The host agreement shall contain a provision that the applicant will pay the full cost of at least one full-time employee of the locality whose responsibility it will be to monitor and inspect waste transportation and disposal

11/30/01 FRI 18:11 FAX 402 341 8712 COCKLE PRINTING

practices in the locality. The host agreement shall also provide that the applicant shall, when requested by the host locality, split air and water samples so that the host locality may independently test the sample, with all associated costs paid for by the applicant. All such sampling results shall be provided to the Department. For purposes of this subdivision, "host agreement" means any lease, contract, agreement or land use permit entered into or issued by the locality in which the landfill is situated which includes terms or conditions governing the operation of the landfill; and

8. If the application is for a locality-owned and locality-operated new municipal solid waste landfill or for an expansion of an existing such municipal solid waste landfill, information on the anticipated (i) daily travel routes and traffic volumes, (ii) daily disposal limit, and (iii) service area of the facility.

C. Notwithstanding any other provision of law:

1. Every holder of a permit issued under this article who has not earlier filed a disclosure statement shall, prior to July 1, 1991, file a disclosure statement with the Director.

2. Every applicant for a permit under this article shall file a disclosure statement with the Director, together with the permit application or prior to September 1, 1990, whichever comes later. No permit application shall be deemed incomplete for lack of a disclosure statement prior to September 1, 1990.

3. Every applicant shall update its disclosure statement quarterly to indicate any change of condition

11/30/01 FRI 18:12 FAX 402 341 8712 COCKLE PRINTING 006

that renders any portion of the disclosure statement materially incomplete or inaccurate.

4. The Director, upon request and in his sole discretion, and when in his judgment other information is sufficient and available, may waive the requirements of this subsection for a captive industrial waste landfill when such requirements would not serve the purposes of this chapter.

D. 1. Except as provided in subdivision D 2, no permit for a new solid waste management facility nor any amendment to a permit allowing facility expansion or an increase in capacity shall be issued until the Director has determined, after an investigation and analysis of the potential human health, environmental, transportation infrastructure, and transportation safety impacts and needs and an evaluation of comments by the host local government, other local governments and interested persons, that (i) the proposed facility, expansion, or increase protects present and future human health and safety and the environment; (ii) there is a need for the additional capacity; (iii) sufficient infrastructure will exist to safely handle the waste flow; (iv) the increase is consistent with locality-imposed or state-imposed daily disposal limits; (v) the public interest will be served by the proposed facility's operation or the expansion or increase in capacity of a facility; and (vi) the additional capacity is consistent with regional and local solid waste management plans developed pursuant to § 10.1-1411. The Department shall hold a public hearing within the said county, city or town prior to the issuance of any such permit for the management of nonhazardous solid waste. Subdivision D 2, in lieu of this subdivision, shall apply to nonhazardous

11/30/01 FRI 18:12 FAX 402 341 6712 COCKLE PRINTING 065

industrial solid waste management facilities owned or operated by the generator of the waste managed at the facility, and that accept only waste generated by the facility owner or operator. The Board shall have the authority to promulgate regulations to implement this subdivision.

2. No new permit for a nonhazardous industrial solid waste management facility that is owned or operated by the generator of the waste managed at the facility, and that accepts only waste generated by the facility owner or operator, shall be issued until the Director has determined after investigation and evaluation of comments by the local government, that the proposed facility poses no substantial present or potential danger to human health or the environment. The Department shall hold a public hearing within the county, city or town where the facility is to be located prior to the issuance of any such permit for the management of nonhazardous industrial solid waste.

E. The permit shall contain such conditions or requirements as are necessary to comply with the requirements of this Code and the regulations of the Board and to protect present and future human health and the environment.

The Director may include in any permit such recordkeeping, testing and reporting requirements as are necessary to ensure that the local governing body of the county, city or town where the waste management facility is located is kept timely informed regarding the general nature and quantity of waste being disposed of at the facility. Such recordkeeping, testing and reporting

11/30/01 FRI 18:12 FAX 102 341 5712 COCKLE PRINTING 006

requirements shall require disclosure of proprietary information only as is necessary to carry out the purposes of this chapter. At least once every ten years, the Director shall review and issue written findings on the environmental compliance history of each permittee, material changes, if any, in key personnel, and technical limitations, standards, or regulations on which the original permit was based. The time period for review of each category of permits shall be established by Board regulation. If, upon such review, the Director finds that repeated material or substantial violations of the permittee or material changes in the permittee's key personnel would make continued operation of the facility not in the best interests of human health or the environment, the Director shall amend or revoke the permit, in accordance herewith. Whenever such review is undertaken, the Director may amend the permit to include additional limitations, standards, or conditions when the technical limitations, standards, or regulations on which the original permit was based have been changed by statute or amended by regulation or when any of the conditions in subsection B of § 10.1-1409 exist. The Director may deny, revoke, or suspend any permit for any of the grounds listed under subsection A of § 10.1-1409.

F. There shall exist no right to operate a landfill or other facility for the disposal, treatment or storage of nonhazardous solid waste or hazardous waste within the Commonwealth. Permits for solid waste management facilities shall not be transferable except as authorized in regulations promulgated by the Board. The issuance of a permit shall not convey or establish any property rights or any exclusive privilege, nor shall it authorize any

11/30/01 FRI 18:12 FAX 102 341 8712 COCKLE PRINTING 006

injury to private property or any invasion of personal rights or any infringement of federal, state, or local law or regulation.

G. No person shall dispose of solid waste in open dumps.

H. No person shall own, operate or allow to be operated on his property an open dump.

I. No person shall allow waste to be disposed of on his property without a permit. Any person who removes trees, brush, or other vegetation from land used for agricultural or forestal purposes shall not be required to obtain a permit if such material is deposited or placed on the same or other property of the same landowner from which such materials were cleared. The Board shall by regulation provide for other reasonable exemptions from permitting requirements for the disposal of trees, brush and other vegetation when such materials are removed for agricultural or forestal purposes.

When promulgating any regulation pursuant to this section, the Board shall consider the character of the land affected, the density of population, and the volume of waste to be disposed, as well as other relevant factors.

J. No permit shall be required pursuant to this section for recycling or for temporary storage incidental to recycling. As used in this subsection, "recycling" means any process whereby material which would otherwise be solid waste is used or reused, or prepared for use or reuse, as an ingredient in an industrial process to make a product, or as an effective substitute for a commercial product.

11/30/01 FRI 18:13 FAX 102 311 8712 COCKLE PRINTING

K. The Board shall provide for reasonable exemptions from the permitting requirements, both procedural and substantive, in order to encourage the development of yard waste composting facilities. To accomplish this, the Board is authorized to exempt such facilities from regulations governing the treatment of waste and to establish an expedited approval process. Agricultural operations receiving only yard waste for composting shall be exempt from permitting requirements provided that (i) the composting area is located not less than 300 feet from a property boundary, is located not less than 1,000 feet from an occupied dwelling not located on the same property as the composting area, and is not located within an area designated as a flood plain as defined in § 10.1-600; (ii) the agricultural operation has at least one acre of ground suitable to receive yard waste for each 150 cubic yards of finished compost generated; (iii) the total time for the composting process and storage of material that is being composted or has been composted shall not exceed eighteen months prior to its field application or sale as a horticultural or agricultural product; and (iv) the owner or operator of the agricultural operation notifies the Director in writing of his intent to operate a yard waste composting facility and the amount of land available for the receipt of yard waste. In addition to the requirements set forth in clauses (i) through (iv) of the preceding sentence, the owner and operator of any agricultural operation that receives more than 6,000 cubic yards of yard waste generated from property not within the control of the owner or the operator in any twelve-month period shall be exempt from permitting requirements provided (i) the owner and operator submit to the

11/30/01 FRI 18:13 FAX 102 342 8712 COCKLE PRINTING

Director an annual report describing the volume and types of yard waste received by such operation for composting and (ii) the operator shall certify that the yard waste composting facility complies with local ordinances. The Director shall establish a procedure for the filing of the notices, annual reports and certificates required by this subsection and shall prescribe the forms for the annual reports and certificates. Nothing contained in this article shall prohibit the sale of composted yard waste for horticultural or agricultural use, provided that any composted yard waste sold as a commercial fertilizer with claims of specific nutrient values, promoting plant growth, or of conditioning soil shall be sold in accordance with the Virginia Fertilizer Act (§ 3.1-106.1 et seq.). As used in this subsection, "agricultural operation" shall have the same meaning ascribed to it in subsection B of § 3.1-22.29.

The operation of a composting facility as provided in this subsection shall not relieve the owner or operator of such a facility from liability for any violation of this chapter.

L. The Board shall provide for reasonable exemptions from the permitting requirements, both procedural and substantive, in order to encourage the development of facilities for the decomposition of vegetative waste. To accomplish this, the Board shall approve an expedited approval process. As used in this subsection, the decomposition of vegetative waste means a natural aerobic or anaerobic process, active or passive, which results in the decay and chemical breakdown of the vegetative waste. Nothing in this subsection shall be construed to prohibit a city or county from exercising its existing authority to

11/30/01 FRI 18:13 FAX 102 343 8712 COCKLE PRINTING 007

regulate such facilities by requiring, among other things, permits and proof of financial security.

M. In receiving and processing applications for permits required by this section, the Director shall assign top priority to applications which (i) agree to accept nonhazardous recycling residues and (ii) pledge to charge tipping fees for disposal of nonhazardous recycling residues which do not exceed those charged for nonhazardous municipal solid waste. Applications meeting these requirements shall be acted upon no later than six months after they are deemed complete.

N. Every solid waste management facility shall be operated in compliance with the regulations promulgated by the Board pursuant to this chapter. To the extent consistent with federal law, those facilities which were permitted prior to March 15, 1993, and upon which solid waste has been disposed of prior to October 9, 1993, may continue to receive solid waste until they have reached their vertical design capacity, provided that the facility is in compliance with the requirements for liners and leachate control in effect at the time of permit issuance, and further provided that on or before October 9, 1993, the owner or operator of the solid waste management facility submits to the Director:

1. An acknowledgement that the owner or operator is familiar with state and federal law and regulations pertaining to solid waste management facilities operating after October 9, 1993, including postclosure care, corrective action and financial responsibility requirements;

11/30/01 FRI 18:14 FAX 402 341 8712 COCKLE PRINTING 071

2. A statement signed by a registered professional engineer that he has reviewed the regulations established by the Department for solid waste management facilities, including the open dump criteria contained therein; that he has inspected the facility and examined the monitoring data compiled for the facility in accordance with applicable regulations; and that, on the basis of his inspection and review, he has concluded that: (i) the facility is not an open dump, (ii) the facility does not pose a substantial present or potential hazard to human health and the environment, and (iii) the leachate or residues from the facility do not pose a threat of contamination or pollution of the air, surface water or ground water in a manner constituting an open dump or resulting in a substantial present or potential hazard to human health or the environment; and

3. A statement signed by the owner or operator (i) that the facility complies with applicable financial assurance regulations and (ii) estimating when the facility will reach its vertical design capacity.

The facility may not be enlarged prematurely to avoid compliance with state or federal regulations when such enlargement is not consistent with past operating practices, the permit will be modified operating practices to ensure good management.

Facilities which are authorized by this subsection to accept waste for disposal beyond the waste boundaries existing on October 9, 1993, shall be as follows:

Category 1: Nonhazardous industrial waste facilities that are located on property owned or controlled by the generator of the waste disposed of in the facility;

Category 2: Nonhazardous industrial waste facilities other than those that are located on property owned or controlled by the generator of the waste disposed of in the facility, provided that the facility accepts only industrial waste streams which the facility has lawfully accepted prior to July 1, 1995, or other nonhazardous industrial waste as approved by the Department on a case-by-case basis; and

Category 3: Facilities that accept only construction-demolition-debris waste as defined in the Board's regulations.

The Director may prohibit or restrict the disposal of waste in facilities described in this subsection which contains hazardous constituents as defined in applicable regulations which, in the opinion of the Director, would pose a substantial risk to health or the environment. Facilities described in category 3 may expand laterally beyond the waste disposal boundaries existing on October 9, 1993, provided that there is first installed, in such expanded areas, liners and leachate control systems meeting the applicable performance requirements of the Board's regulations, or a demonstration is made to the satisfaction of the Director that such facilities satisfy the applicable variance criteria in the Board's regulations.

Owners or operators of facilities which are authorized under this subsection to accept waste for disposal beyond the waste boundaries existing on October 9, 1993, shall ensure that such expanded disposal areas maintain setback distances applicable to such facilities under the Board's current regulations and local ordinances. Prior to the expansion of any facility described in

category 2 or 3, the owner or operator shall provide the Director with written notice of the proposed expansion at least sixty days prior to commencement of construction. The notice shall include recent groundwater monitoring data sufficient to determine that the facility does not pose a threat of contamination of groundwater in a manner constituting an open dump or creating a substantial present or potential hazard to human health or the environment. The Director shall evaluate the data included with the notification and may advise the owner or operator of any additional requirements that may be necessary to ensure compliance with applicable laws and prevent a substantial present or potential hazard to health or the environment.

Facilities, or portions thereof, which have reached their vertical design capacity shall be closed in compliance with regulations promulgated by the Board.

Nothing in this subsection shall alter any requirement for groundwater monitoring, financial responsibility, operator certification, closure, postclosure care, operation, maintenance or corrective action imposed under state or federal law or regulation, or impair the powers of the Director pursuant to § 10.1-1409.

O. Portions of a permitted solid waste management facility used solely for the storage of household hazardous waste may store household hazardous waste for a period not to exceed one year, provided that such wastes are properly contained and are segregated to prevent mixing of incompatible wastes.

P. Any permit for a new municipal solid waste landfill, and any permit amendment authorizing expansion of

11/30/01 FRI 18:14 FAX 402 341 9712 COCKLE PRINTING 074

an existing municipal solid waste landfill, shall incorporate conditions to require that capacity in the landfill will be available to localities within the Commonwealth that choose to contract for and reserve such capacity for disposal of such localities' solid waste in accordance with solid waste management plans developed by such localities pursuant to § 10.1-1411. This provision shall not apply to permit applications from one or more political subdivisions for new landfills or expanded landfills that will only accept municipal solid waste generated within the political subdivision or subdivisions' jurisdiction or municipal solid waste generated within other political subdivisions pursuant to an interjurisdictional agreement.

Q No owner or operator of a municipal solid waste management facility shall accept wastes for incineration or disposal from a vehicle operating with four or more axles unless the transporter of the waste provides certification, in a form prescribed by the Board, that the waste is free of substances not authorized for acceptance at the facility.

11/30/01 FRI 16:15 FAX 402 341 6712 COCKLE PRINTING 075

Va. Code Ann. § 10.1-1408.3 (2001)

§ 10.1-1408.3. Caps on levels of disposal

A. The amount of municipal solid waste received at any landfill authorized to accept such waste shall not exceed an average of 2,000 tons per day, or the documented average actual amount of municipal solid waste received by such landfill on a daily basis during 1998, as reported to the Department of Environmental Quality pursuant to § 10.1-1413.1, whichever is greater, unless the landfill has received approval from the Board pursuant to subsection B for a larger tonnage allotment. The "average actual amount" shall be calculated by dividing the documented 1998 volume reported pursuant to § 10.1-1413.1 by the number of days the landfill received solid waste in 1998. Municipal solid waste removed from a landfill without adequate liner and leachate collection systems and transferred to a landfill with adequate liner and leachate collection systems shall not be included in the calculation of the allowable average daily tonnage pursuant to this section. However, the removal and transfer shall be conducted pursuant to an arrangement entered into prior to January 1, 1999, to which the locality where the waste will be redeposited is a party. For purposes of determining compliance with this section, daily averages shall be calculated based on disposal over a seven-day period.

B. In considering requests for increased tonnage allotments, the Board shall consider those factors set forth in subsection D of § 10.1-1408.1 and other factors it deems appropriate to protect the health, safety and welfare of the people of Virginia and Virginia's environmental and natural resources. No request for an increased

11/30/01 FRI 18:15 FAX 102 311 8712 COCKLE PRINTING 076

tonnage allotment shall be approved by the Board until a public hearing on the proposed increase has been held in the locality where the landfill requesting the increase is located.

C. For any landfill in operation for less than two consecutive years as of December 31, 1998, the documented average actual amount of municipal solid waste received at the landfill on a daily basis shall be based on any consecutive ninety-day period during 1998 but shall not exceed 2,400 tons per day.

D. The provisions of this section shall not be construed as allowing activities related to waste disposal that exceed those that may be found in state or local permits, regulations, ordinances, agreements, contracts or other instruments related to particular facilities or localities.

11/30/01 FRI 18:15 FAX 402 341 8712 COCKLE PRINTING 077

Va. Code Ann. § 10.1-1454.1 (2001)

§ 10.1-1454.1. Regulation of wastes transported by water

A. The Board shall develop regulations governing the commercial transport, loading and off-loading of nonhazardous solid waste (except scrap metal, dredged material and source-separated recyclables), municipal and industrial sludge, and regulated medical waste by ship, barge or other vessel upon the navigable waters of the Commonwealth as are necessary to protect the health, safety, and welfare of the citizens of the Commonwealth and to protect the Commonwealth's environment and natural resources from pollution, impairment or destruction. Included in the regulations shall be provisions governing (i) the issuance of permits by rule to facilities receiving nonhazardous solid waste (except scrap metal, dredged material and source-separated recyclables), municipal and industrial sludge, and regulated medical waste from a ship, barge or other vessel transporting such wastes upon the navigable waters of the Commonwealth and (ii) to the extent allowable under federal law and regulation, the commercial transport of nonhazardous solid wastes (except scrap metal, dredged material and source-separated recyclables), municipal and industrial sludge and regulated medical waste upon the navigable waters of the Commonwealth and the loading and off-loading of ships, barges and other vessels transporting such waste. Also included in the regulations shall be requirements, to the extent material and source-separated recyclables, municipal and industrial sludge, and regulated medical waste upon the navigable waters of the Commonwealth and the loading and off-loading of ships, barges and other vessels transporting such waste. Also

included in the regulations shall be requirements, to the extent allowable under federal law, that: (a) containers holding wastes be watertight and be designed, constructed, secured and maintained so as to prevent the escape of wastes, liquids and odors and to prevent the loss or spillage of wastes in the event of an accident; (b) containers be tested at least two times a year and be accompanied by a certification from the container owner that such testing has shown that the containers are watertight; (c) each container be listed on a manifest designed to assure that the waste being transported in each container is suitable for the destination facility; and (d) containers be stacked no more that two high on barges, and be secured to the barges to prevent accidents during transportation, loading and unloading.

B. A facility utilized to receive nonhazardous solid waste (except scrap metal, dredged material and source-separated recyclables), municipal and industrial sludge, or regulated medical waste from a ship, barge or other vessel regulated pursuant to subsection A, arriving at the facility upon the navigable waters of the Commonwealth, is a solid waste management facility and is subject to the requirements of this chapter. On and after the effective date of the regulations promulgated under subsection A, no new or existing facilities shall receive any wastes regulated under subsection A from a ship, barge or other vessel without a permit issued in accordance with the Board's regulations. No facility shall receive wastes regulated under subsection A by ship, barge or other vessel prior to the effective date of the regulations promulgated pursuant to subsection A.

11/30/01 FRI 18:16 FAX 402 344 5712 COCKLE PRINTING 079

C. The Board shall, by regulation, establish a fee, payable by the owner or operator of any ship, barge or other vessel carrying, loading or off-loading waste regulated under this article on the navigable waters of the Commonwealth, sufficient to recover the administrative and enforcement costs of this article associated with such operations including, but not limited to, the inspection and monitoring of such ships, barges or other vessels to ensure compliance with this article. Such fee shall be assessed in the manner prescribed by the Board.

The owner or operator of a facility permitted to receive wastes regulated under this article from a ship, barge or other vessel shall be assessed a permit fee in accordance with the criteria set forth in § 10.1-1402.1. However, such fees shall also include an additional amount to cover the Department's costs for facility inspections that it shall conduct on at least a quarterly basis.

The fees collected pursuant to this article shall be deposited into a separate account within the Virginia Waste Management Board Permit Program Fund (§ 10.1-1402.2) and shall be treated as are other moneys in that fund except that they shall only be used for the purposes of this article.

D. The Board shall promulgate regulations requiring owners and operators of ships, barges and other vessels transporting wastes regulated under this article to demonstrate financial responsibility sufficient to comply with the requirements of this article as a condition of operation. Regulations governing the amount of any

11/30/01 FRI 18:16 FAX 402 341 8712 COCKLE PRINTING 080

financial responsibility required shall take into consideration: (i) the risk of potential damage or injury to state waters and the impairment of beneficial uses that may result from spillage or leakage from the ship, barge or vessel; (ii) the potential costs of containment and cleanup; and (iii) the nature and degree of injury or interference with general health, welfare and property that may result.

E. The owner or operator of a ship, barge or other vessel from which there is spillage or loss to state waters of wastes subject to regulations under this article shall immediately report such spillage or loss in accordance with the regulations of the Board and shall immediately take all such actions as may be necessary to contain and remove such wastes from state waters.

F. No person shall transport wastes regulated under this article on the navigable waters of the Commonwealth by ship, barge or other vessel unless such ship, barge or vessel and the containers carried thereon are designed, constructed, loaded, operated and maintained so as to prevent the escape of liquids, waste and odors and to prevent the loss or spillage of waste in the event of an accident. A violation of this subsection shall be a Class 1 misdemeanor. For the purposes of this subsection, the term "odors" means any emissions which cause an odor objectionable to individuals of ordinary sensibility.

11/30/01 FRI 18:16 FAX 102 341 8712 COCKLE PRINTING 081

Va. Code Ann. § 10.1-1454.2 (2001)

§ 10.1-1454.2. Transportation of waste upon waters; prohibitions

The provisions of § 10.1-1454.1 will not in all circumstances provide sufficient protection of health, safety and welfare or of the Commonwealth's atmosphere, lands, and waters. Therefore, the commercial transport of hazardous or nonhazardous solid waste (except scrap metal, dredged material and source-separated recyclables) or regulated medical waste by ship, barge or other vessel upon the navigable waters of the Commonwealth is prohibited on the Rappahannock, James and York Rivers, to the fullest extent consistent with limitations posed by the Constitution of the United States, as is necessary to protect health, safety and welfare and the Commonwealth's atmosphere, lands and waters from pollution, impairment or destruction.

11/30/01 FRI 18:16 FAX 402 341 8712 COCKLE PRINTING 002

Va. Code Ann. § 10.1-1454.3 (2001)

§ 10.1-1454.3. Regulation of road transportation of waste

A. The Board, in consultation with the appropriate agencies, shall develop regulations governing the commercial transport of nonhazardous municipal solid waste, except scrap metal and source-separated recyclables, and regulated medical waste by truck as are necessary to protect the health, safety, and welfare of the citizens of the Commonwealth, and to protect the Commonwealth's environment and natural resources from pollution, impairment, or destruction. Included in the regulations, to the extent allowable under federal law and regulation, shall be provisions:

1. Governing the transport of wastes by truck and the design and construction of the containers and trailers transporting waste by truck so that they will be designed, constructed and maintained so as to, as much as is reasonably practicable, prevent the escape of wastes and liquids and to prevent the loss or spillage of wastes to the extent possible in the event of an accident; and

2. Requiring owners of trucks transporting wastes regulated under this article to demonstrate financial responsibility sufficient to comply with the requirements of this article as a condition of operation. Regulations governing the amount of any financial responsibility required shall take into consideration (i) the risk of potential damage or injury that may result from spillage or leakage; (ii) the potential costs of containment and cleanup; and (iii) the nature and degree of injury or interference with general health, welfare and property that may result.

11/30/01 FRI 18:17 FAX 402 341 8712 COCKLE PRINTING 083

B. The owner or operator of a truck from which there is spillage or loss of wastes subject to regulations under this article shall immediately report such spillage or loss in accordance with the regulations of the Board and shall immediately take all such actions as may be necessary to contain and remove such wastes.

C. No person shall transport by truck wastes regulated under this article unless the containers carried thereon are designed, constructed, loaded, operated and maintained in accordance with the regulations developed pursuant to subsection A. A violation of this subsection shall be a Class 1 misdemeanor.

D. For the purposes of this section, the term "truck" means any tractor truck semitrailer combination with four or more axles.

11/30/01 FRI 18:17 FAX 402 341 8712 COCKLE PRINTING 084

Supreme Court, U.S.
FILED
JAN 28 2002
CLERK

(2)

No. 01-808

In the Supreme Court of the United States

RONALD P. HAMM, SECRETARY OF NATURAL RESOURCES, COMMONWEALTH OF VIRGINIA, AND DENNIS H. TREACY, JR., DIRECTOR, DEPARTMENT OF ENVIRONMENTAL QUALITY, COMMONWEALTH OF VIRGINIA

Petitioners,

v.

WASTE MANAGEMENT HOLDINGS, INC., HALE INTERMODAL MARINE COMPANY, WEANACK LAND LIMITED PARTNERS, CHARLES CITY COUNTY, AND BRUNSWICK WASTE MANAGEMENT FACILITY

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

D. ALAN RUDLIN
TIMOTHY G. HAYES
SHAWN A. COPELAND
Hunton & Williams
951 E. Byrd Street
Richmond, VA 23219
(804) 788-8200

Counsel for Respondents Hale Intermodal Marine Co. and Brunswick Waste Management Facility, L.L.C.

KENNETH S. GELLER
EVAN M. TAGER
Counsel of Record
MIRIAM R. NEMETZ
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Respondents Waste Management Holdings, Inc. and Weanack Land Limited Partnership

(Additional Counsel on Inside Cover)

38 pp

JASON S. THOMAS
Hunton & Williams
One Hanover Square
Suite 1400
Fayette Street Mall
Raleigh, NC 27602
(919) 899-3000

Counsel for Respondents
Hale Intermodal Marine Co.
and Brunswick Waste
Management Facility, L.L.C.

MEADE A. SPOTTS
Spotts, Fain, Chappell
& Anderson, P.C.
411 E. Franklin Street
Suite 601
Richmond, VA 23219
(804) 788-1345

Counsel for Respondent
Brunswick Waste
Management Facility, L.L.C.

B. RANDOLPH BOYD
Randolph, Boyd,
Cherry & Vaughan
14 East Main Street
Richmond, VA 23219
(804) 643- 6611

Counsel for Respondent
Charles City County

Counsel for Respondents

QUESTIONS PRESENTED

1. Whether the lower courts erred in concluding that the evidence that the challenged statutes were motivated by an intention to discriminate against out-of-state waste justified application of strict scrutiny.

2. Whether the lower courts erred in concluding that the challenged statutes were not the least discriminatory means of furthering a legitimate state interest.

3. Whether the lower courts erred in concluding that the contention that New York violated the Commerce Clause by "dumping" waste into interstate commerce is not a valid defense to respondents' Commerce Clause claims.

RULE 29.6 STATEMENT

Waste Management Holdings, Inc., is a wholly owned subsidiary of Waste Management, Inc. Hale Intermodal Marine Company and Weanack Land Limited Partners are not publicly held and do not have any parent corporations. Brunswick Waste Management Facility is a wholly owned subsidiary of Allied Waste North America, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... (I)

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

STATEMENT 1

REASONS FOR DENYING THE PETITION 17

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases:

Brimmer v. Rebman, 138 U.S. 78 (1891) 22

C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) 22

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 20, 25

Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) 22

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res., 504 U.S. 353 (1992) 22

Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366 (1976) 26, 29

Harvey & Harvey, Inc. v. County of Chester, 68 F.3d 788 (3d Cir. 1995) 18

Hughes v. Oklahoma, 441 U.S. 322 (1979) 24

Hutchins v. District of Columbia, 188 F.3d 531 (D.C. Cir. 1999) 26

Maine v. Taylor, 477 U.S. 131 (1986) 24

New Energy Co. v. Limbach, 486 U.S. 269 (1988) 29

Reeves, Inc. v. Stake, 447 U.S. 429 (1980) 28

Stone v. Graham, 449 U.S. 39 (1980) 19

Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) 19

TABLE OF AUTHORITIES — Continued

Page(s)

Statutes and Regulations:

42 U.S.C. § 6901 *et seq* 1

Va. Code Ann. § 10.1-1408.1.Q 12

Va. Code Ann. § 10.1-1408.3 9

Va. Code § 10.1-1454.1 10

Va. Code Ann. § 10.1-1454.1.A 11

Va. Code Ann. § 10.1-1454.1.A(d) 11

Va. Code Ann. § 10.1-1454.2 11

Va. Code Ann. § 10.1-1454.3.A 12

Va. Code Ann. § 10.1-1454.3.A(1) 12

Va. Code Ann. § 10.1-1454.3.A(2) 12

Va. Code Ann. § 10.1-1454.3.B 13

Va. Code Ann. § 10.1-1454.3.C 13

Va. Code Ann. § 10.1-1454.3.D 12

N.C. Admin. Code tit. 15A, r. 13B.1202 25

9 Va. Admin. Code § 20-120-130.D.2 25

9 Va. Admin. Code § 20-80-250.c 26

BRIEF FOR THE RESPONDENTS IN OPPOSITION

As it comes to this Court, this case involves three provisions of Virginia law that were enacted for the avowed purpose of limiting the importation of municipal solid waste ("MSW") for disposal in Virginia. Both courts below found the evidence of discriminatory animus to be overwhelming and both courts held that the challenged provisions were not the least discriminatory means of achieving any legitimate state interest. Those rulings constitute straightforward applications of well-established Commerce Clause principles that do not warrant this Court's review.

STATEMENT

1. ***MSW Landfills in Virginia.*** There are seven state-of-the-art "regional" landfills and 63 "local" landfills in Virginia that accept MSW. C.A. App. 497.[1] Respondent Waste Management Holdings, Inc. ("WMH") operates five of the regional landfills (*ibid.*), and respondent Brunswick Waste Management Facility, Inc. ("Brunswick") operates a sixth (*id.* at 467). Each of the regional landfills was designed and constructed to meet or exceed stringent state and federal standards, including all requirements established by Subtitle D of the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* *Id.* at 468, 497, 888. By contrast, many of Virginia's 63 "local" landfills do not meet Subtitle D standards and have been documented to be contaminating the groundwater. *Id.* at 513, 515-526.

The regional landfills were developed with the expectation that they would receive substantial volumes of MSW, including out-of-state MSW. *Id.* at 469, 498. Each of the regional landfills in fact receives substantial quantities of waste

---

[1] Citations to the joint appendix in the Fourth Circuit are designated "C.A. App. __."

generated outside of Virginia. *Id.* at 499-500. According to a November 1998 report issued by the Virginia Department of Environmental Quality ("DEQ"), more than 70% of the MSW received by the seven regional landfills was generated outside Virginia, accounting for 97% of Virginia's imported waste. *Id.* at 499-500, 511. By contrast, 53 of the 63 local landfills received no out-of-state waste, and the remaining ten accounted for only 3% of Virginia's total waste imports. *Id.* at 500.

2. ***WMH's Contracts to Dispose of Waste Generated in New York City.*** For several decades, New York City had disposed of its residential MSW at the Fresh Kills landfill in Staten Island. C.A. App. 472. In 1997, Mayor Rudolph Giuliani announced that the Fresh Kills landfill would cease receiving waste by December 31, 2001. *Ibid.* Thereafter, the New York City Department of Sanitation began to seek interim contracts for the disposal of residential MSW elsewhere. *Id.* at 473. WMH was awarded several of these interim contracts and began transporting a significant amount of this waste to its Virginia landfills. *Ibid.* WMH also submitted a proposal for a long-term contract to dispose of up to 12,000 tons per day of New York's residential MSW after the closing of Fresh Kills. *Id.* at 474. The proposal contemplated sending a significant quantity of the waste to landfills in Virginia. *Ibid.*

WMH also receives for disposal approximately 8,000 to 10,000 tons per day of commercial MSW (*i.e.*, waste from stores, restaurants, and other non-industrial sources) generated in the New York City area. *Id.* at 490. In 1998, WMH decided to begin transporting some of this waste to Virginia by barge. *Ibid.* It entered into negotiations with respondent Hale Intermodal Marine Company to barge the MSW to the James River facility, with the expectation of beginning barging in March or April 1999. *Id.* at 491. WMH also purchased 400 double-walled steel containers designed to meet the standards for the waterborne transportation of MSW set forth in Va. Code § 10.1-1454.1. *Ibid.* These containers are substantially sturdier than conventional containers and are more protective of the

environment than many of the vessels that are routinely used to ship commodities more hazardous than MSW on Virginia's waterways. *Id.* at 465-466.

3. ***Virginia's Hostile Reaction to the Increased Importation of Out-of-State MSW.*** In June 1998, DEQ released a report indicating that Virginia had imported 788,000 tons of solid waste in the fourth quarter of 1997 and that most of the waste was being disposed of at the regional landfills. C.A. App. 564-565. This information, combined with reports that WMH planned to ship increasing amounts of New York MSW to Virginia, much of it by barge, triggered an almost-immediate "not-in-my-backyard" response by the Commonwealth's legislators and public officials. In July 1998, for example, Senator William T. Bolling wrote to Attorney General Mark Earley:

> With the impending closure of the Fresh Kills Landfill in New York, I am concerned that the pressure for additional importation will increase even more in the next few years. If it is legally possible to do so, I would like to introduce legislation during the 1999 session of the General Assembly that would place restrictions on such importations.

Id. at 576.

Further impetus for a legislative attack on out-of-state waste was supplied barely a month later, in August 1998, when the Congressional Research Service released a report indicating that Virginia had become the second largest importer of MSW, disposing of 2.8 million tons of out-of-state solid waste per year. *Id.* at 582.

Consistent with the intention expressed in his July letter to the Attorney General, on September 30, 1998, Senator Bolling announced that he would introduce solid waste legislation in the upcoming legislative session. In the memorandum describing his proposals, he stated that Virginia "is currently

the second largest importer of out of state waste in the nation"; that "the pressure to import larger amounts of out of state waste to Virginia will increase dramatically in the next few years"; that WMH "recently announced a new contract with New York City that could bring up to 2,400 tons of garbage a day to Virginia," most of which "will be transported by barge on Virginia's waterways"; and that "the vast majority" of garbage "currently disposed of in the Fresh Kills landfill * * * may be heading to Virginia." *Id.* at 601.

On the same day, Senator Bolling issued a press release stating in part:

> There is tremendous excess capacity in Virginia's landfills today. If we don't act now to cap the total amount of waste that can be disposed of in Virginia's landfills, the amount of waste being brought to Virginia from other states will increase significantly in the next few years. Such caps are the only effective way of limiting the amount of waste that is being imported to Virginia, and preserving our current landfill capacity for future generations of Virginians.

Id. at 607. Senator Bolling specifically noted that "the pressure to import solid waste to Virginia would increase significantly * * * with the impending closure of the Fresh Kills landfill" and that WMH was "making a $20 million investment in" the James River facility. *Id.* at 606.

In November 1998, DEQ submitted a report on the management of MSW in Virginia. The report observed that the seven regional landfills accounted for 97% of the imported MSW and that 70% of the waste received by those facilities was imported. *Id.* at 503, 505, 511. Soon after receiving the report, Governor Gilmore imposed a moratorium on new landfill development and instructed his Secretary of Natural Resources to "make recommendations to me for consideration at the next regular session of the General Assembly." *Id.* at 610. Later that month, House Speaker Thomas Moss asked

rhetorically: "If out-of-state trash is such a good thing, why doesn't New York State keep it there?" *Id.* at 40, 152.

Meanwhile, Virginia's status as a leading importer of waste and the plans of WMH to dispose of New York MSW in Virginia were becoming widely publicized. In January 1999, the Center for Public Policy at Virginia Commonwealth University announced that, "[b]y a margin of nearly ten to one, Virginians favor limiting the amount of out-of-state garbage coming into Virginia." *Id.* at 611. Also in January, *The Washington Post* reported that WMH planned to ship 3,900 tons per day of New York MSW by barge to the Charles City County Landfill. *Id.* at 614-615. In response, Senator Bolling stated that "[t]his ratchets up the importance of the General Assembly doing something substantive this year to address the problem." *Id.* at 96, 173. Governor Gilmore's press secretary announced that the Governor was "outraged that this additional garbage is coming into the Commonwealth" and would call for legislation limiting imports of out-of-state waste. *Ibid.*

Delivering his State of the Commonwealth address the next day, Governor Gilmore stated that he was "deeply concerned about the importation of out-of-state trash," specifically noting that "a major company [had] announced plans to import four thousand more tons of New York City trash into Virginia per day." *Id.* at 630. He added:

> I believe the Commonwealth has a right — and I would say a duty — to ban the use of barges for the transportation of garbage on Virginia's waterways!
>
> I'll ask the General Assembly to enact such a ban to impose tough new permit requirements on the construction or expansion of new landfill space, caps on the amount of waste that can be deposited in Virginia landfills and increased inspections of waste being hauled by truck or other means.

Ibid. A few days later, the Governor publicly released a letter to Mayor Giuliani. Among other things, the letter stated:

> I am greatly concerned by your recent comments regarding the transport of New York City's municipal waste to Virginia and the policy you announced in December to increase exports of waste to neighboring states. * * * Let me assure you that the home state of Washington, Jefferson, and Madison has no intention of becoming New York's dumping grounds.
>
> Over the past two weeks, one company in Virginia has tripled its shipments of New York's municipal waste to Virginia landfills to approximately 3,000 tons a day. The company also reports that it expects shipments to increase to roughly 2.2 million tons per year by 2002. Already, Virginia ranks as the second largest importer of municipal solid waste, behind only Pennsylvania. This is highly unacceptable.

Id. at 633-634.

The following week, Governor Gilmore announced that he was proposing, and that Senator Bolling would be the principal sponsor of, three solid waste bills, stating:

> The home state of Washington, Jefferson, and Madison has no intention o[f] becoming the nation's dumping grounds. * * * That is why I've asked Senator Bolling to sponsor these bills that will increase state regulations on landfills, cap daily landfill deposits, and ban trash barges on Virginia's waterways.

Id. at 635.

Senator Bolling promptly followed with a memo to the members of the Solid Waste Subcommittee of the Senate Committee on Agriculture, Conservation, and Natural Resources (the "Solid Waste Subcommittee"), stating:

Earlier this year, the [DEQ] published their first written report quantifying the amount of waste that was being placed in Virginia's landfills. Surprisingly, this report indicated that Virginia was receiving 3.2 million tons of garbage from other states, primarily New York. * * * Virginia was identified as the second largest importer of waste in the nation.

Unfortunately, the amount of garbage being imported to Virginia has grown dramatically in the past year. That is primarily due to the impending closure of the Fresh Kills landfill in New York City, and the fact that Waste Management, Inc., who owns most of the large regional landfills in Virginia, has received the contract to handle the relocation of the Fresh Kills waste stream.

* * *

[W]e may have to site an entire generation of new landfills in Virginia 20 years sooner than we would otherwise have to do simply because our current landfill space is being filled up by waste from other states.

* * *

[T]hese waste deposits could create long term environmental problems for Virginia. * * * While we have no choice but to assume this burden for our own waste, we should feel no obligation to assume that burden for the waste of other states.

* * *

I would suggest that becoming the nation's "King of Trash" is not consistent with the image we have tried to promote for Virginia. * * * How can we possibly promote Virginia as the Silicon Dominion of the 21st century while we stand idly by and allow Virginia to become the largest importer of garbage in the nation.

Id. at 637-638; see also *id.* at 644-650. Meeting with the Solid Waste Subcommittee a few days later, Senator Bolling again made it clear that the legislation was designed to address the problem of out-of-state waste, stating:

> [E]ven though the headlines in the newspapers talk about New York trash, it is not just a New York problem. It is a problem where this waste is now coming to Virginia from 24 other states and Puerto Rico.

Id. at 672.

While the General Assembly was considering the legislation, a group called Campaign Virginia was aggressively lobbying for limitations on out-of-state waste. Campaign Virginia sent letters to legislators emphasizing that Virginia was "**the #2 importer of trash** in the nation" and that "[t]he major waste companies are negotiating with New York City for the privilege of carting the 4.3 million tons of the City's garbage." *Id.* at 1351 (emphasis in original).[2] It ran radio advertisements encouraging voters to inform their legislators "that Virginia's had all the garbage we're going to take." *Id.* at 1353. The Sierra Club, too, encouraged voters to write members of the General Assembly that "Virginia citizens have said enough" to importation of out-of-state waste, and to request that legislators declare support for legislation "ban[ning] the barging of municipal solid waste on Virginia's waters." *Id.* at 1358.

The antipathy toward out-of-state MSW was exemplified in Delegate Donald L. Williams's speech on the floor of the General Assembly:

---

[2] In an amicus brief filed with the district court, Campaign Virginia stated that, "[i]n pursuit of the legislation herein challenged, [it] contacted more than 300,000 people, from whom approximately 15,000 letters and several thousand telephone calls went to legislators." Dist. Ct. Doc. # 80, at 1.

> Do we want to be known as the capital of garbage?
>
> Maybe we need a new bumper sticker — instead of Virginia is for lovers, what about Virginia is for garbage? Or how about a special license plate with a dumpster on it?
>
> Mr. Speaker, I do not believe we need to be the capital of garbage in our state. Do you believe any large corporation would locate in the garbage capital of the country?
>
> What a message we are sending, buy a home, live in the great Commonwealth, the number one importer of garbage.

Id. at 1007. Each of Delegate Williams' rhetorical questions was greeted with a chorus of "nos" from the assembled body (*ibid.*), which shortly thereafter enacted the legislation.

4. ***Virginia Enacts Legislation that Effectuates its Discriminatory Purpose.*** The legislation enacted by the General Assembly and signed by the Governor was carefully crafted to frustrate at every turn the stated plans of WMH for the transportation and disposal of New York waste. The provisions include:

a. ***The cap.*** Va. Code Ann. § 10.1-1408.3 (hereinafter "the cap") provides in relevant part:

> A. The amount of municipal solid waste received at any landfill authorized to accept such waste shall not exceed an average of 2,000 tons per day, or the documented average actual amount of municipal solid waste received by such landfill on a daily basis during 1998, * * * whichever is greater, unless the landfill has received approval from the [Virginia Waste Management] Board pursuant to subsection B for a larger tonnage allotment.

The legislative history reflects that the cap was deliberately gerrymandered to ensure that it would affect only the regional landfills. An early draft of the provision would have limited ***all*** landfills to a 5% increase over 1998 volumes. After local governments objected that this provision would unduly restrict the growth of local landfills handling only Virginia waste, the bill was amended to allow the greater of 1998 volumes or 2,000 tons per day. C.A. App. 665; see also *id.* at 1065-1067 (testimony of director of public waste authority that he expressed concerns to Senator Bolling that the original cap provision would adversely affect the local landfills). DEQ provided Senator Bolling with information confirming that the 2,000 tons-per-day cap would restrict the expansion of the regional landfills while having no impact on local landfills. *Id.* at 666, 1059-1060.

Armed with DEQ's statistics, Senator Bolling informed the Solid Waste Subcommittee that "[t]he vast majority of [MSW] received at the seven regional landfills in Virginia comes from other states" (*id.* at 667) and provided data showing that six of those seven landfills would be affected by the cap. *Id.* at 667-671. He also assured the Subcommittee that ***only*** those landfills would be affected, explaining that "[e]very other landfill in Virginia is significantly below 2,000 tons" and that "most local landfills in Virginia are below 100 tons a day." *Id.* at 673.

b. ***The prohibitions on transportation of MSW by vessel.*** The General Assembly also amended Va. Code § 10.1-1454.1 to effectively prohibit the use of barges to transport MSW into Virginia. Governor Gilmore articulated the discriminatory motive underlying the amendments, stating at the time they were introduced: "Barge traffic is a cheap and easy way to import trash from far distances. If we can put the clamps on that, then we can address the issue of trucks." C.A. App. 675.

To "put the clamps" on barge traffic, the General Assembly modified an existing statute (enacted the preceding year)

requiring the Virginia Waste Management Board to promulgate regulations governing the commercial transportation of solid waste on vessels upon the navigable waters of Virginia. Va. Code Ann. § 10.1-1454.1.A. Although existing law already required the Board to promulgate regulations that would protect human health, safety, and the environment, the new legislation specifically directed the Board to issue a regulation requiring that "containers [of solid waste] be stacked no more than two high on barges." *Id.* § 10.1-1454.1.A(d) (the "container-stacking limitation"). The new legislation also prohibited all barging of waste to any Virginia facility until the required regulations became effective. *Ibid.*

While the latter provision would have put in place an immediate ban of indefinite duration on barging to Virginia landfills, the container-stacking limitation would effectively preclude barging permanently. Barges that carry containerized MSW ordinarily are loaded with containers stacked five high. C.A. App. 489. It would more than double the shipping costs per ton, and thus make it economically impracticable to ship MSW by barge, if the waste containers could be stacked only two high. *Id.* at 491. Moreover, because only an insignificant amount of MSW is shipped by vessel within Virginia (*id.* at 501), and because none of that waste is shipped on container barges (*ibid.*), the container-stacking limitation would have no effect on the transportation of Virginia's waste.

Adopting a "belt-and-suspenders" approach to preventing the barging of MSW to Virginia, the General Assembly also specified that "the commercial transport of hazardous or nonhazardous solid waste * * * by ship, barge or other vessel upon the navigable waters of the Commonwealth is prohibited on the Rappahannock, James and York Rivers." Va. Code Ann. § 10.1-1454.2 (the "three-river ban"). By blocking its access to three major waterways, this provision would have prevented WMH from using barges to transport out-of-state MSW to its Virginia landfills. C.A. App. 501. The provision would have had no impact, however, on the only in-state solid waste that is

transported by vessel, which is shipped over the Chesapeake Bay. *Ibid.*

c. ***The trucking restrictions.*** Well aware that substantial amounts of out-of-state MSW are imported into Virginia on trucks having four or more axles, the General Assembly enacted restrictions on such vehicles that do not apply to the smaller two or three-axle vehicles that carry mostly Virginia waste.

First, the General Assembly prohibited landfill operators from accepting MSW from a vehicle with four or more axles "unless the transporter of the waste provides certification, in a form prescribed by the Board, that the waste is free of substances not authorized for acceptance at the facility." Va. Code Ann. § 10.1-1408.1.Q (the "certification requirement"). Because virtually all out-of-state MSW that is transported by truck is delivered in vehicles having four or more axles (C.A. App. 482, 501-502), while the majority of Virginia MSW is delivered to landfills in vehicles with fewer than four axles (*id.* at 484), the certification requirement would have imposed a disproportionate burden on the transportation of out-of-state waste.

Second, the General Assembly required the Board to develop regulations governing the "commercial transport" of MSW by "any tractor truck semitrailer combination with four or more axles." Va. Code Ann. § 10.1-1454.3.A, D. Among other things, the new regulations must require that, as a condition of carrying MSW on Virginia roads, the owners of such trucks make financial assurances that trucks having fewer than four axles or carrying other cargo need not make. *Id.* § 10.1-1454.3.A(2). The regulations also must provide that containers and trailers carrying waste "be designed, constructed and maintained so as to * * * prevent the escape of wastes and liquids and to prevent the loss or spillage of wastes to the extent possible in the event of an accident" (*id.* § 10.1-1454.3.A(1)) and prohibit covered vehicles from transporting waste "unless

the containers carried thereon are designed, constructed, loaded, operated and maintained in accordance with the regulations developed pursuant to subsection A." *Id.* § 10.1-1454.3.C. The new provisions also include spill reporting and cleanup obligations, the violation of which is a Class 1 misdemeanor. *Id.* § 10.1-1454.3.B, C.

Five-axle tractor-trailers are used to carry waste from transfer stations to disposal sites, but are not used to collect waste from individual generators. C.A. App. 482. Virtually all of the out-of-state MSW transported by truck to Virginia goes through transfer stations and is delivered on commercially operated tractor-trailers having four or more axles. *Id.* at 482, 501-502. By contrast, only about 24% of Virginia-generated waste is processed through transfer stations and loaded onto tractor trailers, and about one-quarter of that tonnage is carried by Southeastern Public Service Authority ("SPSA"), a public entity. *Id.* at 483. Because SPSA is arguably exempt from the provisions by the limitation to "commercial transport," only about 18% of Virginia-generated waste is affected at all by the provision. *Ibid.* Thus, although the new provisions purport broadly to govern the "[t]ransportation of [m]unicipal [s]olid and [m]edical [w]aste by [t]ruck," in fact they apply principally to trucks carrying MSW in interstate commerce, while leaving unregulated the transportation of at least 76%, and as much as 82%, of Virginia's waste.

There can be little doubt that the discriminatory effect of the trucking provisions was intended. In his September 30, 1998 press release, Senator Bolling stated that the regulations required by his proposed legislation "should include minimum standards for the containers waste is transported in, as well as an aggressive inspection and monitoring program to make sure that ***waste coming to Virginia*** is being transported appropriately." *Id.* at 608 (emphasis added). His January 26, 1999 memo to the Solid Waste Subcommittee also signaled his goal of reducing the flow of interstate MSW, stating: "It is entirely possible that these regulations could have the impact of

actually reducing garbage truck traffic on Virginia's highways." *Id.* at 642. Because the provisions carve out the traffic carrying the overwhelming majority of waste generated in Virginia, it is obvious that the reduction that Senator Bolling anticipated was in vehicles carrying ***out-of-state*** MSW. Governor Gilmore's statement linking the regulation of trucking to the goal of reducing out-of-state waste (*id.* at 675) confirms that he shared Senator Bolling's discriminatory views.

5. ***Proceedings Below.*** Respondents WMH, Hale, Weanack, and Charles City County jointly filed a complaint against Governor Gilmore and other state officials, alleging that the cap, the barging restrictions, and the trucking limitations violated the Commerce Clause and that the barging restrictions also were preempted by federal law. Shortly thereafter, respondent Brunswick Waste Management Facility filed a similar complaint, after which the two cases were consolidated.

The day before the legislation was to go into effect, the district court preliminarily enjoined the cap and the barging restrictions, stating that "both sets of restrictions are almost certainly invalid under the Commerce Clause." Pet. App. 83-84. The court explained:

> The timing of the General Assembly's actions and the statements made by the legislation's chief proponents, including Governor Gilmore, leave no room for doubt that it was enacted with one overriding purpose: to restrict the importation of out-of-state waste, particularly New York waste, into the Commonwealth.

Id. at 88. The court also stated that "there is no question but that the practical effect of both the barging restrictions and the cap provision will be to burden the flow of out-of-state waste across Virginia's borders while leaving in-state waste unaffected." *Id.* at 89. See also *id.* at 88 (finding that the provisions "are plainly discriminatory in both their purpose and 'practical effect'").

Thereafter, the defendants filed an answer and a motion to join New York City as an involuntary plaintiff. The answer raised as an affirmative defense the contention that "the acts of New York City and/or New York State to discourage or prevent disposal of [MSW] in the City and in the State also violate the Constitution and public policy and distort interstate commerce." C.A. App. 179. On plaintiffs' motion, the district court struck this defense (Pet. App. 147-153), noting that defendants' theory that New York violated the Commerce Clause by exporting its waste was contradicted by "abundantly clear" case law providing that "the Commerce Clause is implicated when a state *restricts* the flow of waste across its borders," not when "it *utilizes* the channels of interstate commerce to meet its waste disposal needs." *Id.* at 151 (emphasis in original). The court also denied the defendants' motion to join New York City as a plaintiff, stating: "[E]ven if the Commonwealth could demonstrate that the City has somehow violated the Commerce Clause, it is not entitled to retaliate by discriminating against interstate waste. Such 'tit-for-tat' protectionism is precisely the sort of thing that the Framers sought to avoid by giving Congress, and not the states, authority to regulate interstate commerce." C.A. App. 215.

After discovery, the district court granted plaintiffs' motion for summary judgment, holding each of the challenged provisions invalid under the Commerce Clause.[3] Finding that "Virginia appears to have adopted measures that would frustrate or preclude the importation of MSW at every turn" (Pet. App. 141), the court ruled that the provisions were subject to strict scrutiny and that they plainly failed that test. First, the court held that the defendants had failed to demonstrate "that no adequate, nondiscriminatory alternatives exist that would

---

[3] Because the district court's memorandum opinion did not mention the trucking restrictions, WMH filed a motion for clarification. The court confirmed that "[s]ummary judgment was granted as to the trucking provisions," and that its memorandum opinion "appl[ied] fully" to those provisions. *Id.* at 1416.

protect local interests just as well as the disputed statutes," while plaintiffs — who were not obligated to do so — had "offered some possible alternatives to the disputed statutes." *Id.* at 141-142. Second, the court rejected Virginia's contention that "the disputed statutes are demonstrably justified by a valid factor unrelated to economic protectionism." *Id.* at 142-143 (internal quotation marks omitted). According to the court, "[t]he tenor of public discussion * * * makes clear that Virginia was motivated by economic protectionism, and therefore any post-hoc efforts to shroud its actions in the cloak of environmental conservation and resource preservation are ineffectual." *Id.* at 144.

The Fourth Circuit affirmed in part and vacated in part. After setting forth the extensive evidence of hostility toward out-of-state waste on the part of the Governor and General Assembly (*id.* at 31-39), the court concluded: "No reasonable juror could find the statutory provisions at issue had a purpose other than to reduce the flow of MSW generated outside Virginia into Virginia for disposal." *Id.* at 39-40. The court then proceeded to conclude that three of the provisions at issue — the cap and the two trucking provisions — failed the virtually *per se* rule of invalidity that applies to discriminatory statutes. *Id.* at 42-48, 49-51. The court concluded that an issue of fact remained as to whether the two barging provisions were the least discriminatory means of furthering a legitimate state interest (*id.* at 48-49), but concluded that the three-river ban was preempted by federal vessel documentation laws (*id.* at 57-58). Accordingly, the court remanded for a trial on whether the stacking limitation is the least discriminatory means of accomplishing Virginia's legitimate interest in preventing contamination of its rivers from unintended MSW spills.

REASONS FOR DENYING THE PETITION

Petitioners urge review of three issues. The third is patently frivolous. The first and second constitute nothing more than quibbles with the Fourth Circuit's application of well-established Commerce Clause principles. None warrants certiorari, much less overturning the decisions of both courts below.

1. Petitioners first urge the Court to grant certiorari in order to establish the standard applicable to statutes motivated in part by discrimination and in part by legitimate concerns. Review of this issue is unwarranted for several reasons.[4]

First, petitioners never squarely raised this issue in the court of appeals. Instead, they contended that our evidence was insufficient to show that the legislature acted with discriminatory motives, asserting that (i) we were required to prove "that a majority or at least a significant bloc of legislators acted with the prescribed motive" (Opening Brief of Defendants-Appellants at 43); (ii) "the vast majority of evidence submitted by Plaintiffs in support of their summary judgment arguments was not admissible" (*id.* at 44); (iii) "[a]t best, Plaintiffs' evidence indicates that a few Virginia office-holders, including the Governor, were aware of the problems

---

[4] Petitioners also imply that the Court should grant review to determine whether discriminatory intent alone — *i.e.*, in the absence of facial discrimination or discriminatory effect — is enough to trigger strict scrutiny. Pet. 15. They waived any such contention below by conceding in their opening brief in the court of appeals:

> A statute can discriminate against out-of-state interests in one of three ways: (1) facially, (2) purposefully, or (3) in effect. If the statute discriminates in one of these ways, the court applies a "strict scrutiny" analysis under which the statute is invalid unless justified by a valid factor unrelated to economic protectionism and there are no less restrictive alternatives.

Opening Brief of Defendants-Appellants at 41 (citation omitted).

and dangers associated with interstate waste in Virginia" and that "[s]uch 'evidence' unquestionably fails to establish discriminatory motivations of the 138 members of the Assembly who voted on this legislation" (*id.* at 45); (iv) "Plaintiffs did not present specific evidence of intent regarding each statute being challenged" (*ibid.*); and (v) "[i]n any event, the Commonwealth presented ample evidence rebutting any notion of improper motive by the General Assembly" (*id.* at 46).[5] Indeed, petitioners obliquely acknowledge that they raised entirely different arguments below than they do now, stating: "In proceedings below, the Commonwealth disputed the allegation of discriminatory motives; however, that dispute is not at issue in this petition." Pet. 16 n.7.

Second, petitioners have failed to demonstrate (or even assert) that the decision of the Fourth Circuit conflicts with either prior decisions of this Court or the decisions of any other federal court of appeals or state supreme court.[6] The best they can do is to assert that a rule that strict scrutiny applies

---

[5] Petitioners did at one point assert that we "did not even come close to demonstrating, *as a matter of law*, that a majority of the Virginia General Assembly enacted this legislation for the sole purpose of burdening out-of-state commerce." *Id.* at 44 (emphasis in original). However, it is clear from the ensuing sentence that petitioners' argument had to do with whether the statements of a few key participants in the legislative process are sufficient to establish a discriminatory purpose, not whether that purpose had to be exclusive. See *ibid.* ("The crux of Plaintiffs' entire case was that Virginia Governor James S. Gilmore, III, (who is not a member of the General Assembly) and Senator William Bolling, the sponsor of the legislation, were hostile to the flow of waste coming into Virginia from New York.").

[6] As far as we can discern, the only appellate court to address the question directly has held that "in order to find a dormant Commerce Clause violation there is no requirement that discrimination must be the 'primary' purpose or effect." *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 803 (3d Cir. 1995).

whenever the legislation was motivated in part by discrimination is inconsistent with this Court's Establishment Clause jurisprudence. Pet. 14, 16, 19. Because petitioners are unable to cite a single lower court decision finding the Establishment Clause standard to be applicable in the Commerce Clause area, any perceived tension with that standard is not a basis for granting review here.[7]

Third, even if the Court were inclined to establish a special standard for mixed purpose cases, this case would be an inappropriate vehicle because, despite petitioners' unsupported assertion to the contrary (Pet. 5), the Fourth Circuit concluded that discrimination against out-of-state MSW was the ***sole*** purpose of the challenged statutes:

> ***No reasonable juror could find the statutory provisions at issue had a purpose other than to reduce the flow of MSW generated outside Virginia into***

---

[7] Even if cases from other areas of law were relevant, the standard applied in equal protection cases would be more pertinent than the Establishment Clause standard because, as in equal protection cases, a finding that a law challenged under the Commerce Clause had a discriminatory motivation results in strict scrutiny, not outright invalidation as is the case in the Establishment Clause context (see, *e.g., Stone v. Graham*, 449 U.S. 39 (1980) (per curiam)). In the leading Equal Protection Clause case on the subject, this Court has observed:

> Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. * * * When there is a proof that a discriminatory purpose has been a motivating factor in the decision, * * * judicial deference is no longer justified.

Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-266 (1977). Needless to say, there is no inconsistency between the Fourth Circuit's decision and the standard articulated in *Arlington Heights*.

> ***Virginia for disposal.*** Indeed, the very purpose the Defendants proffer in this litigation for the enactment of the statutory provisions at issue – to alleviate or at least reduce health and safety threats to Virginia's citizens and environment created by the importation of MSW from states with less strict limitations upon the content of MSW than Virginia – fully supports our conclusion. This is because an inherent component of the Defendants' proffered purpose of Virginia's enactment of the statutory provisions at issue is discrimination against MSW generated outside Virginia.

Pet. App. 39-40 (emphasis added).[8]

Fourth, petitioners are simply wrong in asserting (Pet. 17) that "the case is not cluttered by the two factors that commonly lead to strict scrutiny" — *i.e.*, that "none of the MSW statutes are [sic] discriminatory on their face" and, for the three provisions at issue here, "there has been no showing of a discriminatory effect" (*ibid.* (emphasis omitted)). Although it is undisputed that the statutes are facially neutral, this case is very much "cluttered" by substantial (indeed, we submit, insuperable) evidence that the statutes discriminate in their practical effect. The Fourth Circuit held merely that there existed "a genuine issue of material fact" as to whether the challenged provisions discriminate in their practical effect against out-of-state MSW, not that there was no evidence of discriminatory effect at all. Pet. App. 28, 30. Accordingly, contrary to petitioners' contention, this case does not present an opportunity to consider whether a statute that was animated by

---

[8] As the Fourth Circuit recognized, it is well settled that the existence of a legitimate underlying purpose for a statute that employs intentionally discriminatory means does not immunize the statute from strict scrutiny. See *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 627 (1978) (citing cases in which "a presumably legitimate goal was sought to be achieved by the illegitimate means of isolating the State from the national economy").

mixed purposes, but has no discriminatory impact, nonetheless must be subjected to strict scrutiny.

In fact, notwithstanding the Fourth Circuit's holding that issues of fact precluded summary judgment on this basis, the undisputed evidence established to a mathematical certainty that the challenged statutes have a discriminatory effect. That showing would have necessitated application of strict scrutiny even if there had been no evidence of a discriminatory purpose. The overwhelming evidence of discriminatory effect hence supplies an alternative basis for affirmance, and makes this case an even less attractive vehicle for addressing issues relating to discriminatory intent.

With respect to the cap, the undisputed evidence was that the 2,000 ton-per-day limit would immediately impact six of the seven regional landfills that together account for 97% of the out-of-state waste that is disposed of in Virginia. C.A. App. 500, 670. Meanwhile, ***not a single*** local landfill was expected to be affected by the cap. To the contrary, the data provided by DEQ to the General Assembly showed that "[e]very other landfill in Virginia is significantly below 2,000 tons." *Id.* at 673. It is hard to imagine a clearer showing of discriminatory effect.

The Fourth Circuit found there to be a dispute of fact on the basis of petitioners' contention that our declarant did not have first-hand knowledge of the future capacity needs of the local landfills. In particular, the Fourth Circuit noted that one local landfill had filed a request for a waiver of the cap. Pet. App. 27-28. But even if true, the fact that one local landfill might someday need to exceed the cap (but see C.A. App. 1002) does not render the statute nondiscriminatory. Even then, the cap would immediately burden 85.7% (six out of seven) of the regional landfills that account for 97% of the out-of-state MSW, while similarly burdening at most 1.6% (one out of 63) of the local landfills. Under this Court's consistent case law, that kind of massive disparity in the treatment of intrastate

versus interstate commerce is more than enough to demonstrate discriminatory effect as a matter of law. See, *e.g.*, *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391 (1994) (flow control ordinance that required that all waste in the town be processed at designated transfer station "is no less discriminatory because in-state or in-town processors are also covered by the prohibition"); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res.*, 504 U.S. 353, 361-363 (1992) (striking down law permitting local governments to ban out-of-county waste from their landfills even though the law affected a substantial amount of in-state waste along with all out-of-state waste); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (invalidating ordinance prohibiting sale of milk unless pasteurized within five miles of city even though prohibition affected substantial amounts of in-state milk along with all out-of-state milk); *Brimmer v. Rebman*, 138 U.S. 78, 81-83 (1891) (striking down prohibition on sale of meat slaughtered more than 100 miles from point of sale even though prohibition burdened some in-state meat producers).

The undisputed evidence also demonstrated that the trucking provisions would have had a discriminatory effect. By limiting the certification requirement to vehicles having four or more axles, the General Assembly ensured that ***all*** trucks carrying out-of-state waste would be burdened (see C.A. App. 482, 501-502), while a substantial percentage of trucks carrying Virginia waste would not be (*id.* at 484). The only dispute involved the exact percentage of local trucks that would be subjected to the requirement. Under the cases just cited, that kind of dispute is insufficient to create an issue of fact as to whether a statute discriminates.

Similarly, there is no dispute that, because it applies only to tractor-trailors with four or more axles, the provision requiring the promulgation of regulations governing the trucking of MSW would burden virtually all vehicles carrying out-of-state waste (see C.A. App. 482, 501-502) but would not affect the vast majority of trucks carrying Virginia waste. In the district

court, we adduced evidence that between 76% and 82% of Virginia waste is carried on vehicles that would not be subjected to the truck regulations. *Id.* at 483. Petitioners never disputed that, at most, 24% of Virginia waste is carried on tractor-trailers and that the remaining 76% would not be covered by the required regulations. They merely quibbled with our contention that one-quarter of the Virginia waste carried on tractor-trailers (*i.e.*, 6% of Virginia waste) would be exempt from the regulations on other grounds. Even accepting that 24% and not 18% of Virginia waste would be subject to the regulations while 100% of out-of-state would be covered, that disparity is more than enough to constitute a discriminatory impact.

In sum, the first issue petitioners ask the Court to address was neither presented nor decided by the court of appeals and, even if it had been, this case is not a good one in which to resolve it.

2. The Fourth Circuit accepted *arguendo* that Virginia's definition of waste that may lawfully be deposited in MSW landfills is more stringent in certain respects than the definitions of some of Virginia's sister states. It concluded, however, that a cap that makes no distinction between waste from states that have more stringent definitions than Virginia and waste from states that have less stringent definitions is not the least discriminatory means of ensuring that unacceptable categories of waste do not find their way into landfills located in Virginia. In particular, the Fourth Circuit held that a cap that limits waste from only those states that have less stringent definitions than Virginia's would be less discriminatory than a cap that limits waste from all states. Petitioners' second issue asks the Court to review that conclusion. Review is unwarranted for several reasons.

First, this issue is a narrow, case-specific one that cannot be said to recur in Commerce Clause litigation. Petitioners point to no conflict among the circuits or with the decisions of any

state supreme courts. They do contend that the Fourth Circuit's decision "is contrary" to this Court's decision in *Maine v. Taylor*, 477 U.S. 131 (1986), asserting that "[t]his Court's approval of a *total* ban on a particular product from all States stands in stark contrast to the court of appeals' interpretation." Pet. 21, 22 (emphasis in original). The asserted contradiction is non-existent. In *Taylor*, the Court held that a ban on the importation of live baitfish served a legitimate state interest based on two critical findings of the magistrate: (i) Maine's indigenous fish would be placed at risk by parasites prevalent in out-of-state baitfish, but not common to indigenous fish; and (ii) non-native species inadvertently included in shipments of live baitfish could severely disrupt Maine's aquatic ecology. 477 U.S. at 141, 142-143, 148. Each of these two concerns about out-of-state baitfish applied regardless of the source of the baitfish and therefore supported a ban on all out-of-state baitfish. In the present case, by contrast, Virginia's interest is limited to states whose definitions of MSW are more liberal than Virginia's.[9]

Second, before this Court could even reach petitioners' issue, it would have to address our threshold contention that the "legitimate justifications the State has put forward for its statute are merely a sham or a '*post hoc* rationalization" (*Taylor*, 477 U.S. at 149 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 338 n.20 (1979))) and hence are entitled to no weight. See Pet. App. 144 (district court's conclusion that Virginia's "post-hoc efforts to shroud its actions in the cloak of environmental conservation and resource preservation are ineffectual"). The ample legislative history contains no suggestion that the General Assembly's hostility toward out-of-state waste,

---

[9] Petitioners do suggest that an across-the-board limit is warranted because of the possibility that either Virginia or other states will change their laws. Pet. 23. Because such a rationale would permit ***every state*** not just to limit, but to ban, all out-of-state waste — thereby ending interstate commerce in waste — it plainly is an argument that proves too much.

particularly that from New York, was grounded in any qualitative distinction between Virginia's and other states' definitions of acceptable MSW.[10] To the contrary, legislators expressed concern that imported waste would prematurely exhaust Virginia's landfill capacity, impose burdens on Virginia that should be borne by other states, and ruin Virginia's image (see pages 3-9, *supra*) — all of which are improper motivations under the Commerce Clause. See, *e.g.*, *City of Philadelphia*, 437 U.S. at 627 ("a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders"). Because the proffered justification for the cap was an after-the-fact invention of defendants' counsel and their retained expert witnesses, the cap provision fails strict scrutiny whether or not it can be said to be the least discriminatory means of

---

[10] Indeed, several DEQ employees admitted during depositions that DEQ never indicated to the members of the General Assembly that a 2,000 ton-per-day cap was necessary to control unauthorized waste from states with less stringent definitions of MSW. See C.A. App. 754-755, 991, 1246-1247. That is hardly surprising because petitioners' contention (Pet. 20) that "MSW from other States is more dangerous to the public health than MSW from Virginia" is grossly overblown. Petitioners asserted below, for example, that North Carolina allows "liquid blood" in the waste stream, but in fact North Carolina exempts blood from regulation as medical waste only if it is enclosed in an individual container of less than a teaspoon and is segregated and stored in a secure area before offsite disposal. N.C. Admin. Code tit. 15A, r. 13B.1202. The regulations of Maryland, the District of Columbia, New York State and New York City are at least as stringent in their regulation of items contaminated by blood as Virginia's regulations — which allow materials contaminated with "small amounts" of blood to be mixed into the solid waste stream. 9 Va. Admin. Code § 20-120-130.D.2. There was undisputed evidence, moreover, that medical waste and other unauthorized material frequently has been found in waste shipments from in-state sources. C.A. App. 872, 888, 896, 915-950.

accomplishing that objective. See, *e.g.*, *Hutchins v. District of Columbia*, 188 F.3d 531, 567 (D.C. Cir. 1999).

Third, the Fourth Circuit's conclusion is clearly right. Accepting *arguendo* that the rationale for the challenged legislation really does have to do with the fact that certain states have more lenient definitions of MSW than does Virginia, it follows that any cap should be narrowly tailored to address only the waste from those states. Conversely, a cap that limits waste from other states that have similar or more stringent definitions than Virginia plainly is not the least discriminatory means of addressing the putative concern identified by defendants.

Finally, even if the Court were to reach the question whether a cap limited to certain states is a less discriminatory alternative and then conclude that it is not, that would not change the result because we raised several other potential alternatives that Virginia never attempted, much less proved to be infeasible. For example, DEQ could increase inspections of MSW arriving at landfills. *See Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 377 (1976) ("[i]n the absence of adequate assurance that the standards of a sister State, either as constituted or as applied, are substantially equivalent to its own, [a state] has the obvious alternative of applying its own standards of inspection" to imported goods). Indeed, DEQ had already requested and received funding to double its inspection force, but, as of the time the summary judgment motion was briefed, had not yet fully deployed those resources. C.A. App. 956, 959.

Virginia could also tighten requirements for self-policing. For example, it could amend its regulations — which now require only periodic, random inspection for hazardous waste (9 Va. Admin. Code § 20-80-250.c) — to require landfill operators to have trained inspectors working at all times. In addition, the Commonwealth could require certification by transporters that the MSW they carry contains no unauthorized material as defined by Virginia's regulations. One of the

provisions struck down in this case contains such a requirement; we challenged that provision only because it was limited to trucks having four or more axles and thereby discriminated against out-of-state MSW. A properly designed, non-discriminatory certification requirement would help to ensure that ***all*** waste brought to disposal facilities in Virginia meets Virginia's regulations, without disproportionately burdening out-of-state waste.

And if a cap of some sort were necessary to promote effective inspections or self-policing, there clearly are less discriminatory alternatives to the gerrymandered cap at issue here. For example, DEQ could be directed to determine for each landfill a cap that takes into account its topography, operating characteristics, and other factors bearing on its ability to be inspected effectively. Indeed, petitioners' own witnesses conceded that the ability to inspect a landfill properly varies with "the application, the design and operation of the facility" (C.A. App. 763) and that "[y]ou can't take a cookie cutter approach to every single facility" (*id.* at 1073). Requiring an individualized determination would be far more even-handed than an arbitrary 2,000-ton-per day cap that limits the growth of the regional landfills, while allowing local landfills to grow without restriction regardless of their amenability to inspection or the quality of their self-policing. Indeed, if Virginia truly were concerned about the risks posed by the shipment of dangerous materials to its MSW landfills, it would have directed its regulatory efforts toward the many local landfills that do not comply with Subtitle D and may be contaminating the groundwater (see page 1, *supra*), rather than to the regional landfills that meet or exceed these federal standards and are far more protective of the environment.

In sum, the Fourth Circuit was clearly correct in holding that the cap is not the least discriminatory means of addressing Virginia's purported concern about differences in the definition of acceptable MSW. Moreover, the question whether the Fourth Circuit misapplied the strict scrutiny standard is a case-

specific one as to which there is no conflict among the courts. Finally, there are both threshold issues and alternative bases for affirmance that cannot be severed from the question presented. Accordingly, this issue is a poor candidate for review.

3. Petitioners' final issue is whether the lower courts erred in rejecting the contention that Virginia was justified in discriminating against out-of-state waste because New York supposedly violated the Commerce Clause by "dumping" waste into interstate commerce. Once again, petitioners can point to ***no*** case from any court that conflicts with the lower courts' resolution of this issue. To the contrary, as the district court noted, petitioners' theory that New York violated the Commerce Clause by exporting its waste was contradicted by "abundantly clear" case law providing that "the Commerce Clause is implicated when a state *restricts* the flow of waste across its borders," not when "it *utilizes* the channels of interstate commerce to meet its waste disposal needs." Pet. App. 151 (emphasis in original).

Moreover, neither the State of New York nor New York City statutorily required that New York City waste be disposed of outside of New York. Instead, the requests for proposal merely indicated a preference for transportation of waste by barge (which is not inherently inconsistent with the use of in-state disposal facilities). In other words, the City was acting as a market participant, rather than a market regulator, which forecloses any possibility that its actions could be deemed to violate the Commerce Clause. See, *e.g.*, *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980) ("There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.").

In any event, even if New York's decision to close the Fresh Kills landfill and to express a preference for the use of barging in its RFPs could be said to have violated the Commerce Clause, that violation would not be a valid defense to our claims because, as the district court explained, "[a] state

may not escape responsibility for violating the Commerce Clause by pointing to another state's violation." Pet. App. 152-153. It is firmly established that discrimination by one state does not justify retaliation by another. *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988); *Cottrell*, 424 U.S. at 379-380 (1976).

Finally, as the Fourth Circuit pointed out, "[e]ven assuming arguendo that New York's alleged conduct should legally prevent it from bringing a constitutional challenge under the dormant Commerce Clause to the statutory provisions at issue, at the risk of stating the obvious, neither the State of New York nor New York City is a plaintiff in this litigation." Pet. App. 56. Petitioners do not attack the Fourth Circuit's conclusion that the conduct of a non-party may not be raised as a defense to the claim of a party. Accordingly, even if the Court were to agree with petitioners that the Commerce Clause prohibits "dumping" goods into interstate commerce, such a ruling would not alter the result, and this case therefore is not an appropriate vehicle for addressing the issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

D. ALAN RUDLIN
TIMOTHY G. HAYES
SHAWN A. COPELAND
Hunton & Williams
951 E. Byrd Street
Richmond, VA 23219
(804) 788-8200

Counsel for Respondents Hale Intermodal Marine Co. and Brunswick Waste Management Facility, L.L.C.

KENNETH S. GELLER
EVAN M. TAGER
Counsel of Record
MIRIAM R. NEMETZ
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Respondents Waste Management Holdings, Inc. and Weanack Land Limited Partnership

JASON S. THOMAS
Hunton & Williams
One Hanover Square
Suite 1400
Fayette Street Mall
Raleigh, NC 27602
(919) 899-3000

Counsel for Respondent Hale Intermodal Marine Co. and Brunswick Waste Management Facility, L.L.C.

B. RANDOLPH BOYD
Randolph, Boyd, Cherry & Vaughan
14 East Main Street
Richmond, VA 23219
(804) 643- 6611

Counsel for Respondent Charles City County

MEADE A. SPOTTS
Spotts, Fain, Chappell
& Anderson, P.C.
411 E. Franklin Street
Suite 601
Richmond, VA 23219
(804) 788-1345

Counsel for Respondent
Brunswick Waste
Management Facility, L.L.C.

Counsel for Respondents

JANUARY 2002

(3)

No. 01-808

Supreme Court, U.S.
FILED
FEB 12 2002
CLERK

In The

Supreme Court of the United States

W. TAYLOE MURPHY, JR.,
Secretary of Natural Resources, Commonwealth of Virginia, and ROBERT G. BURNLEY, Director, Department of Environmental Quality, Commonwealth of Virginia,

Petitioners,

v.

WASTE MANAGEMENT HOLDINGS, INCORPORATED, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JERRY W. KILGORE
Attorney General of Virginia

WILLIAM H. HURD
State Solicitor
Counsel of Record

E. MONTGOMERY TUCKER
Deputy Attorney General

JOHN BUTCHER
ROGER L. CHAFFE
Senior Assistant Attorneys General

WILLIAM E. THRO
Special Assistant Attorney General

900 East Main Street
Richmond, Virginia 23219
(804) 786-2436 (voice)
(804) 371-0200 (facsimile)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

14 pp

QUESTIONS PRESENTED

1. Under the dormant Commerce Clause, what is the appropriate level of scrutiny for a statute arising from mixed motives, partly legitimate and partly discriminatory?

2. When a State enacts laws to protect itself from the health and safety hazards posed by municipal solid waste, may the State impose identical restrictions on *all* such waste – regardless of its source – or is the State obligated to give preferential treatment to waste from States whose laws are facially similar to the laws of the regulating State?

3. (a) Under the dormant Commerce Clause, may a State interfere with the national common market by forcing – or "dumping" – undesirable goods into interstate commerce so as to protect the originating State from their undesirable effects?

   (b) If not, to what extent are the goods thus "dumped" nevertheless protected by the dormant Commerce Clause?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

I. The Court Should Clarify Which Level of Scrutiny Applies When a Statute Has Mixed Purposes 1

II. The Court Should Decide Whether a State, in the Exercise of Its Sovereign Powers Over Health and Safety, Is Required to Give Preferential Treatment to Goods from Particular States 4

III. The Court Should Clarify Whether a State May Interfere with the National Common Market by Requiring the Export of Undesirable Products 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Batson v. Kentucky,
476 U.S. 79 (1985) 2

C & A Carbone, Inc. v. Town of Clarkstown,
511 U.S. 383 (1994) 5

Chemical Waste Management v. Hunt,
504 U.S. 334 (1992) 5

Dean Milk Co. v. City of Madison,
340 U.S. 349 (1951) 5

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 504 U.S. 353 (1992)..... 5

Great Atlantic & Pacific Tea Co. v. Cottrell,
424 U.S. 366 (1976) 5

Harvey & Harvey, Inc. v. County of Chester,
68 F.3d 788 (3d Cir. 1995)..... 2

Maine v. Taylor,
477 U.S. 131 (1986) 4, 5, 6

Marks v. United States,
450 U.S. 188 (1977) 3

Oregon Waste Sys., Inc. v. Department of Environmental Quality, 511 U.S. 93 (1994)..... 5

Philadelphia v. New Jersey,
437 U.S. 617 (1978) 8

Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977)..... 2

STATUTES

Sup. Ct. R. 10(c)..... 8

Sup. Ct. R. 35.3 1

REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

This reply brief is filed by Virginia Attorney General Jerry W. Kilgore on behalf of W. Tayloe Murphy, Jr., Secretary of Natural Resources of Virginia, and Robert G. Burnley, Director of the Virginia Department of Environmental Quality (collectively, "the Commonwealth").[1]

I. THE COURT SHOULD CLARIFY WHICH LEVEL OF SCRUTINY APPLIES WHEN A STATUTE HAS MIXED PURPOSES.

This case presents an important issue of constitutional law: What level of scrutiny applies when a statute arises from mixed motives, partly legitimate and partly discriminatory? Respondents do not deny the importance of this issue, nor do they contend that the Court has previously decided it. Instead, they attempt to dissuade the Court from granting *certiorari* by claiming this case is not a good vehicle for addressing the question. They are mistaken.

A. Respondents suggest, in effect, that the Commonwealth should have struck a different balance in its arguments below, focusing less on facts and more on the legal standard to be applied to the facts. Br. in Opp. at 17-18. Yet, the Commonwealth made plain its view that strict scrutiny is triggered under the "purpose" prong only when legislation is enacted for "the *sole* purpose of burdening out-of-state consumers." Opening Brief of Defendants-Appellants at 44 (emphasis added). Thus, the Commonwealth argued, the fact that discriminatory purposes motivated "a *few* of Virginia office-holders . . . unquestionably fails to establish discriminatory motivations of *the 138 members* of the General Assembly who

---

[1] The original petitioners, Ronald P. Hamm and Dennis H. Treacy, have been succeeded in office by Mr. Murphy and Mr. Burnley. *See* Sup. Ct. R. 35.3.

voted on this legislation." *Id.* at 45 (emphasis added). Thus, the Commonwealth argued that the "sole purpose" standard was not met. This approach was rejected by the Fourth Circuit, but, the issue was preserved.

B. Respondents say rejection of the "sole purpose" standard does not represent a conflict in Commerce Clause cases. Br. in Opp. at 18-19. Yet, the case they cite, *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 803 (3d Cir. 1995), does not support the standard used below. While *Harvey* says the discriminatory purpose need not be "primary" in order to invoke strict scrutiny, it does *not* say that "any" discriminatory purpose will suffice.

More importantly, when one steps back from Commerce Clause cases and looks more broadly at the jurisprudence of legislative purpose, there is definitely a conflict. The petition showed a conflict between the approach followed below and the way legislative purpose is approached in Establishment Clause cases, a point respondents do not dispute. Instead, respondents suggest that a more pertinent standard would be the one followed in equal protection cases. Br. in Opp. at 19. It is a suggestion the Court may wish to consider if *certiorari* is granted. At this stage, however, what is important about the equal protection cases is that they *also* approach legislative purpose in a way that conflicts with the approach below. This is shown by *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), cited by respondents. There the Court said that if racial discrimination is shown to be a purpose, then the defendants are entitled to show that that they would have reached the same decision even if the illegitimate motive had not been at play. *Id.* at 270, n. 21. *See also Batson v. Kentucky*, 476 U.S. 79, 96-97 (1985) (once the accused has shown the prosecutor is excluding jurors of a particular race, the prosecutor is allowed to present non-racial reasons for the exclusion). This contrasts sharply with the approach followed below, where the inquiry into legislative purpose ends once *any* illegitimate purpose is found.

C. Respondents claim the Fourth Circuit decision does not permit a conclusion that mixed motives were at work here. Br. in Opp. at 19. The court said the evidence is sufficient to show that the statutes are "justified by a reason other than economic protectionism." App. at 44. Respondents ignore this finding. Instead, they quote this passage: "No reasonable juror could find the statutory provisions at issue had a purpose other than to *reduce the flow* of MSW generated outside Virginia into Virginia for disposal." Br. in Opp. at 19, quoting App. 39-40 (emphasis added). There is no conflict between the two passages.[2] Reduction of out-of-state products has a "discriminatory purpose" in the sense at issue here only to the extent the *underlying* purpose is economic protectionism.[3] To say that the purpose of these statutes is to reduce the flow of out-of-state waste does not say whether the underlying purposes of that reduction are economic protectionism (*i.e.*, discrimination) and/or some benign and, hence, non-discriminatory purpose. While the Fourth Circuit found economic protectionism to be afoot, it also found evidence to support a finding of other, benign motives, *i.e.*, protection of the public health. In short, the Fourth Circuit correctly recognized that *mixed* motives may be at work.

D. Respondents claim the evidence of discriminatory *effect* is so strong they are entitled to summary judgment on the point. They say this is an alternative basis for invoking strict scrutiny here, and they spend several paragraphs reciting evidence they think shows

---

[2] Moreover, to the extent this Court believes that there is a conflict between these two passages, the narrower passage, which is the Commonwealth's interpretation, must control. *See generally Marks v. United States*, 450 U.S. 188, 193 (1977).

[3] Were it otherwise, then a facially neutral statute enacted solely for the benign motive of protecting the public health would be subject to strict scrutiny simply because the health threat was one emanating chiefly from outside the state. Such a result goes too far.

discriminatory effect. The Commonwealth need not respond in kind. First, the issue does not appear in either of the competing "Questions Presented." *Compare* Pet. at i with Br. in Opp. at (I). Second, the Fourth Circuit carefully reviewed the evidence in order to determine whether there was discriminatory effect as a matter of law. On the three statutes at issue here – the Daily Cap, the Trucking Certification, and Four Axle – the court rejected summary judgment on discriminatory effect, finding instead a genuine dispute of material facts. It is unlikely that respondents could persuade this Court to reach a different conclusion. Third, if the Court agrees with the Commonwealth that mixed motives do not trigger strict scrutiny, the case will need to be remanded for further proceedings. Respondents will have a chance on remand to persuade a finder of fact that there is a discriminatory effect. Respondents' attempt to litigate discriminatory effect now is misplaced, and should not deter the Court from clarifying the legal standard for assessing discriminatory purpose.

II. THE COURT SHOULD DECIDE WHETHER A STATE, IN THE EXERCISE OF ITS SOVEREIGN POWERS OVER HEALTH AND SAFETY, IS REQUIRED TO GIVE PREFERENTIAL TREATMENT TO GOODS FROM PARTICULAR STATES.

Even if the court of appeals were somehow correct in applying strict scrutiny, Virginia has a legitimate public health concern that could justify a restriction on interstate commerce. The Fourth Circuit acknowledged this point.[4] Given *Maine v. Taylor*, 477 U.S. 131 (1986), the court of appeals should have allowed Virginia to place limits on all municipal solid waste ("MSW"), regardless of source, as a means of protecting the public health. Yet, the court of appeals said Virginia must treat MSW differently,

---

[4] Contrary to respondents' brief, the Fourth Circuit did not simply assume "arguendo" that this was so. Br. in Opp. at 23.

depending upon the State of origin. App. 47-48. This decision is not only contrary to *Taylor*, but is unreasonable and unworkable. *See* Pet. at 20-23. *Certiorari* should be granted in order to address the discretion available to a State when it restricts interstate commerce for health and safety reasons.

A. Respondents first argue that the issue is too narrow and case-specific to merit this Court's attention. Br. in Opp. at 23. They are mistaken. Virginia is not the only State that has a problem wrestling with the health hazards of out-of-state waste. This is shown, for example, by the number of cases dealing with out-of-state wastes heard by this Court in recent years. *See, e.g., C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994); *Oregon Waste Sys., Inc. v. Department of Environmental Quality*, 511 U.S. 93 (1994); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. 353 (1992); *Chemical Waste Management v. Hunt*, 504 U.S. 334 (1992). Moreover, the need to regulate interstate commerce for health and safety reasons arises in contexts other than waste disposal. Analogous concerns arises in the context of agricultural commodities. *See, e.g., Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

B. Respondents next contend that there is no conflict between the decision below and *Taylor*. They say that *all* out-of-state baitfish posed health hazards for Maine, while only *some* out-of-state waste poses health hazards for Virginia. Br. in Opp. at 24. Again, they are mistaken. In *Taylor*, it was far from certain that *any* baitfish posed a health risk. *See Taylor*, 477 U.S. at 142. Yet, this Court found that "Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible." *Id.* at 148. Conversely, in this case, it is undisputed that *some* out-of-state MSW poses health hazards. If Maine has a legitimate interest in protecting against "imperfectly understood environmental risks" then Virginia certainly has at least as much legitimate

interest in protecting against a health risk that all parties acknowledge.

Moreover, in determining whether an outright ban was the least discriminatory means of achieving the objective, *Taylor* did not require the State to take the extraordinary measures required by the Fourth Circuit. It is likely that baitfish from some States were more dangerous than baitfish from other States. Yet, this Court did not require a state-by-state analysis of whether baitfish contained the problematic parasite. Instead, this Court said that a "State must make reasonable efforts to avoid restraining the free flow of commerce across its borders, but it is not required to develop new and unproven means of protection at an uncertain cost." *Taylor*, 477 U.S. at 147. Thus, the Court allowed Maine to treat all out-of-state baitfish as a single category and, based on the *potential* of significant health risks within that category, allowed the entire category to be banned. If the court of appeals had followed *Taylor*, it would have treated out-of-state MSW coming into Virginia as a single category and allowed Virginia to place limits on the entire category.

C. Respondents seek to dissuade the Court from granting *certiorari* by attacking the legitimacy of Virginia's health and safety interests, calling those interests a "sham" and "post-hoc rationalization." Pet. at 24-25. This strident accusation runs contrary to the Fourth Circuit's finding that the evidence supports the Commonwealth's claim of legitimate purpose. "Legitimate purpose" and "least discriminatory means" are two separate parts of the Commerce Clause strict scrutiny test. There is no need for the Court to revisit facts pertaining to the former in order to decide what legal standard applies to the latter.

D. Respondents say the Fourth Circuit decision is "clearly right." Br. in Opp. at 26. They ask this Court to accept that assertion without addressing – much less refuting – the Commonwealth's explanation of why a state-by-state approach is unreasonable and unworkable.

Pet. at 22-23. Respondents' inability to defend the practical consequences of the decision below underscores the worth of this case as a candidate for *certiorari*.

E. Finally, respondents claim that Virginia has feasible alternatives *other than* the state-by-state approach required by the court of appeals. Br. in Opp. at 26-27. The Commonwealth disagrees. The alternatives proposed by respondents carry their own set of problems in terms of costs, inefficiency and ineffectiveness. The court of appeals has not addressed any of them. This Court need not do so either, and certainly need not be concerned about them in deciding whether to grant *certiorari*. Later, if the Court agrees with the Commonwealth that a state-by-state approach cannot be required, then the Court may remand the case for further proceedings on the factual minutiae of respondents' alternative theories.

III. THE COURT SHOULD CLARIFY WHETHER A STATE MAY INTERFERE WITH THE NATIONAL COMMON MARKET BY REQUIRING THE EXPORT OF UNDESIRABLE PRODUCTS.

The Constitution creates a national common market where interstate commerce must flow freely. Absent special circumstances, individual States may not restrict interstate trade. By the same logic, individual States should not be able to *require* interstate trade by artificially diverting – *i.e.*, dumping – undesirable goods into other States. Yet, the issue of interstate dumping has never been addressed by this Court. It is a "missing corner" of Commerce Clause jurisprudence.

A. Respondents ask the Court to deny *certiorari* because there is no conflict among the lower courts. But they failed to address the analogous issues discussed in the petition. Several courts have held that a State cannot "banish" or "export" its undesirable citizens (*i.e.*, convicts) to other States. *See Pet.* at 28-29. Yet, even without such cases, interstate dumping still presents an important

question of constitutional law that has not been, but should be, settled by this Court. S. Ct. R. 10(c). While respondents demean the question as "frivolous," Br. in Opp. at 17, they never explain why they think it is unimportant. Nor do they deny that interstate dumping violates principles of free trade among the States. The issue is clearly one worthy of this Court's attention.

B. Respondents also claim that, in acting to divert its wastes across state lines, New York City was acting as "a market participant, rather than a market regulator," and was thus immune from restrictions of the Commerce Clause. Br. in Opp. at 28. In other words, respondents challenge the legal adequacy of the Commonwealth's affirmative defenses by claiming that, even if allowed to assert those defenses, Virginia would not prevail on the facts. This is inappropriate. Having persuaded the courts below not to hear any evidence about Virginia's affirmative defenses, respondents cannot now go outside the record with self-serving, untested claims about what such evidence would show.

Moreover, respondents offer little support for their market participant theory. They say that New York did not *statutorily* require wastes from the City to be exported to other States. They also claim that New York's requests for proposal "merely indicated a preference" for the use of barges. The Commerce Clause forbids a State from attempting to isolate itself from a common economic problem. *See Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978). It is no defense to say that New York achieved that isolation without passing a statute. There was still government action aimed at achieving isolation. Respondents do not deny that the barge "preference" has the purpose and effect of precluding disposal in upstate New York sites reachable only by truck; nor do they deny that New York discriminates against Virginia and other States by giving communities in New York a veto over whether garbage from the City would be taken there. *See* Pet. at 9-10.

Whether New York was acting as a market participant – or as market regulator – is an issue that respondents may be entitled to raise – on remand – once it is established that the Commonwealth is entitled to assert its affirmative defenses. This Court should grant *certiorari*, establish Virginia's right to assert those defenses, and remand the case for a consideration of the relevant evidence.

C. The respondents mischaracterize Virginia's position when they suggest the Commonwealth is seeking a right of retaliation. Virginia does not seek to divert its garbage into New York, nor does it seek retaliation in any other way. Instead, Virginia seeks to show: (i) that the Commerce Clause precludes New York from requiring the exportation of undesirable goods, and (ii) that a violation of that constitutional provision affects this case in three ways that are independent grounds for denying respondents declaratory or injunctive relief. First, contracts that result from unconstitutional conduct – including respondents' waste disposal contracts – are against public policy and therefore null and void. The inability to perform such a contract is not a cognizable injury. As parties to such contracts, respondents lack standing to challenge the validity of the Virginia statutes that allegedly prevent such performance. Second, as the Commonwealth alleged, but was never allowed to prove, the respondents have "unclean hands." Thus, on familiar equitable principles, they are not entitled to injunctive relief. Third, goods placed in interstate commerce in violation of the Commerce Clause should not be allowed to claim the protection of the Commerce Clause, at least when subjected to facially neutral measures of the type at issue here. Those contentions are far different from contending that one State may retaliate against another.

D. Finally, respondents are mistaken when they suggest that the connection between respondents and the unconstitutional conduct of New York is not an issue. As discussed above in paragraph (c) and in the petition, Pet. at 29-30, that connection is very much an issue, and it

directly implicates the extent to which wastes unconstitutionally dumped into interstate commerce by New York may nevertheless be protected by the dormant Commerce Clause. *See* Question Presented No. 3 (b).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted this 12th day of February 2002.

JERRY W. KILGORE
Attorney General of Virginia

WILLIAM H. HURD
State Solicitor
Counsel of Record

E. MONTGOMERY TUCKER
Deputy Attorney General

JOHN BUTCHER
ROGER L. CHAFFE
Senior Assistant Attorneys General

WILLIAM E. THRO
Special Assistant Attorney General

900 East Main Street
Richmond, Virginia 23219
(804) 786-2436 (voice)
(804) 371-0200 (facsimile)